No. 75-1464

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH M. MCCRANE, JR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ROBERT H. BORK,
Solicitor General,

SCOTT P. CRAMPTON,
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The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 527 F. 2d 906. The opinion of the district court (App. D, *infra*) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 1975 (App. B, *infra*). The gov-

ernment's timely petition for rehearing with suggestion for rehearing *en banc* was denied on February 11, 1976 (App. C, *infra*). On March 9, 1976, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to April 11, 1976 (a Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether *Giglio* v. *United States* requires a new trial for nondisclosure of material relating to the credibility of a key government witness, when no false testimony with regard thereto was given by the witness, and the matter was not part of any bargain through which the witness's testimonial cooperation was procured.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides, in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

STATEMENT

1. Following a jury trial in the United States District Court for the Middle District of Pennsylvania,[1]

[1] Respondent was tried initially in the United States District Court for the District of New Jersey, but that court declared a mistrial because of juror misconduct (App. A, *infra*, pp. 2a-3a, n. 1; App. D, *infra*, p. 23a, n. 2). A second trial was commenced in that court but ended prematurely when respondent's motion for a change of venue was granted and the case transferred to the Middle District of Pennsylvania.

respondent was convicted of four counts of aiding the preparation of fraudulent income tax returns, in violation of 26 U.S.C. 7206(2), and was fined $5,000 on each count. Imposition of sentence of imprisonment was suspended and respondent was placed on concurrent terms of three years' probation on each count.

The evidence showed that in his capacity as finance chairman for a successful New Jersey gubernatorial campaign, respondent devised a scheme in which willing donors could claim an unwarranted federal income tax deduction by disguising their political contributions as ordinary and necessary business expenses. Respondent arranged for two complaisant public relations firms to act as conduits by issuing fictitious invoices for advertising services to selected contributors (App. A, *infra*, pp. 3a-4a). The donors then funnelled their contributions through these intermediaries as apparent consideration for services that were never performed (*ibid.*). Respondent advised the contributors to use the false documentation to justify the deduction of these "business expenditures" on their tax returns (App. A, *infra*, p. 14a).

Two counts of the indictment charged respondent with having aided the filing of false income tax returns by the architectural and engineering firm of Bellante, Clauss, Miller & Nolan, Inc., which pleaded

guilty to separate charges of filing knowingly false income tax returns. E. Lawrence Bellante, president of that firm, was the government's principal witness on these charges. He testified before the grand jury and at trial pursuant to a grant of immunity. He stated that respondent solicited two campaign contributions from him, arranged for the transmission of fictitious covering invoices from the agencies, and counseled him to deduct the payments as an ordinary business expense (App. A, *infra*, p. 4a). He also testified that the Bellante firm had deducted these contributions as business expenses for federal income tax purposes, despite his knowledge that the agencies had performed no services for the company (*ibid.*).

On direct examination, Bellante admitted that he was testifying under a grant of immunity. During cross-examination, the defense did not inquire into Bellante's motivation for testifying for the government. Rather than impeaching his credibility, respondent's counsel emphasized the witness's standing in the community in an attempt to prove respondent's innocence by showing that Bellante had not intended to defraud the United States by disguising his contributions, but had acted mistakenly (Tr. 670a-692a).[2]

2. Prior to trial, respondent moved for discovery of (App. A, *infra*, p. 8a)

> all material known to the government * * * which is exculpatory in nature or favorable to the defendant, or may lead to the discovery of exculpatory material or material which may be used to impeach prosecution witnesses * * *.

[2] The defense strategy was different from what it had been at the aborted first trial, when vigorous efforts were undertaken to impeach Bellante.

Although at a hearing on the motion the government stated that it knew of no exculpatory material, the district judge suggested that the prosecution submit for *in camera* review any material the necessity of whose disclosure might be questionable (*ibid.*).

Shortly after his conviction, respondent moved for a new trial, alleging that he had since learned of the existence of certain letters written on Bellante's behalf by the United States Attorney. There were in fact seven such letters, substantially identical in content, that had been sent to current or prospective public authority clients of Bellante's firm (App. A, *infra*, p. 5a, n. 3). Four of the letters were solicited by Bellante's attorney and three by the addressee agencies. These letters were requested and sent subsequent to the time Bellante had been immunized and had testified before the grand jury, but about a year to a year and one-half prior to respondent's trial. They explained the relationship between the United States Attorney's office and Bellante and his firm. Each letter stated that Bellante had received immunity and had testified before the grand jury about his role in the tax fraud scheme; that respondent and

Bellante's firm had been indicted as a result of this testimony; that the Bellante firm should not be penalized for his telling the truth; and that the United States Attorney took no position with respect to what action the contracting agency should take as a result of those disclosures (App. A, *infra*, pp. 5a-6a; App. D, *infra*, pp. 45a-48a).[3]

Respondent contended that had he been able to utilize these letters at trial, he could have impeached Bellante's credibility by showing that his testimony was influenced by preferential treatment by the government.[4] He argued that the prosecution's failure to disclose this impeachment evidence required a new trial on all counts under *Brady* v. *Maryland*, 373 U.S. 83, and *Giglio* v. *United States*, 405 U.S. 150 (App. D, *infra*, p. 48a).

The district court found, however, that the letters contained "simply factual recitations of the status" of Bellante and his firm and disclosed "no evidence of any understanding" between Bellante and the government or any belief on the witness's part that he would receive any favors or privileges in return for his cooperation with the government (App. D, *infra*,

[3] The full text of a representative letter is set forth in the court of appeals' opinion (App. A, *infra*, pp. 6a-7a, n. 4).

[4] However, respondent's counsel strenuously objected to the government's attempt to introduce evidence of one of the matters explicitly referred to in the letters, the indictment (and subsequent guilty plea) of Bellante's firm. The district court sustained respondent's objection that such evidence would be highly prejudicial to his case (Tr. 637a, 1116a-1117a).

p. 52a). The court concluded that the letters could not be characterized as "favorable" to respondent; therefore, it held that their nondisclosure did not violate his due process rights under *Brady* (App. D, *infra*, p. 51a). The court also found that the letters contained no other information reasonably likely to have affected the jury's assessment of Bellante's credibility. Thus, even assuming that the nondisclosure of the letters constituted a "suppression" of evidence under *Brady*, the court held that a new trial was not required under the materiality standard set forth in *Giglio* (App. D, *infra*, pp. 52a-53a).

3. The court of appeals reversed respondent's convictions on the two counts involving the Bellante firm's tax returns and remanded the case for a new trial, holding that the prosecution's failure to disclose these letters to the respondent constituted a denial of due process of law under *Brady* v. *Maryland*.[5] Although it did not deny that the district court reasonably characterized the letters as merely

[5] Petitioner has filed a separate petition for a writ certiorari seeking to overturn the court of appeals' affirmance of his convictions on the two counts found not to have been affected by Bellante's testimony. *McCrane* v. *United States*, No. 75-1323, filed March 15, 1976. However, those charges involved the solicitation of contributions from wholly unrelated companies and the falsification of their federal income tax deductions. Bellante's testimony did not advert to those contributions or the preparation of those tax returns in any way. In our view, as we will argue more fully in responding to McCrane's petition, the issues he presents do not merit review by this Court, nor are they so interrelated to the issues raised herein as to require that the petition be held pending disposition of the instant petition.

containing neutral factual recitations of Bellante's status, the court of appeals nonetheless found that the letters were "favorable" to respondent because the possibility could not be excluded that some of the jurors might have considered that the act of writing the letters itself constituted preferential treatment (App. A, *infra*, p. 11a). The court held that in the particular context of Bellante's examination, the letters were reasonably likely to have affected the jury's verdict and thus satisfied the *Giglio* standard for awarding a new trial.

REASONS FOR GRANTING THE WRIT

Since the landmark decision of this Court in *Brady* v. *Maryland*, 373 U.S. 83, there has been a vast proliferation of litigation regarding the nature and extent of the prosecutor's obligation to disclose information to the defense and the circumstances in which a failure to disclose justifies a new trial. This topic is plainly one of fundamental importance to the administration of criminal justice, yet it is one that, in the thirteen years since *Brady*, this Court has addressed in surprisingly few decisions. Such a case is now pending before this Court (*United States* v. *Agurs*, No. 75-491, certiorari granted, November 17, 1975), and it may be expected that some of the unanswered questions that abound in this area will be authoritatively resolved in that case. Many others will not, however, and we believe that the instant case, which focuses upon the central and recurring

question of the duty to disclose potential impeachment material, affords a suitable vehicle for the Court to supply a much needed delineation of the prosecutor's duties in this area (*Agurs* does not involve impeachment material).

1. Perhaps the best summary of the court of appeals' holding in this case is contained in the district court's characterization of respondent's contention: "* * * *Brady* and *Giglio* require a new trial whenever a search of the government's files at the conclusion of a trial turns up evidence that may have been used by the defense to impeach the credibility of [a key government witness]" (App. D, *infra*, pp. 48a-49a). While the court of appeals gave lip service to a more stringent standard [6] (and would perhaps have found no constitutional violation had the evidence been cumulative of other impeachment material presented to the jury) it clearly found the possibility that some jurors might have thought the non-disclosed evidence pertinent to their evaluation of the witness's credibility sufficient to require a new trial.[7]

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[6] The court stated that "not all impeachment matter must be disclosed; the obligation extends only to that which is material" (App. A, *infra*, p. 9a) and defined as material "information which * * * tends to impair seriously the reliability" of a critical government witness (*id.* at 10a). Nevertheless, the court thought it "clear" that the Constitution is violated by "nondisclosure of evidence *affecting* credibility" (*id.* at 8a-9a; emphasis supplied).

[7] In rejecting the district court's conclusion that the letters were not favorable to respondent, the court of appeals found dispositive its conclusion that "we cannot exclude the * * *

The breadth of the court's view of the constitutional obligations of the prosecution to disclose potential impeachment material is plainly evidenced by the result it reached in the circumstances of this case. A new trial was ordered, and the prosecution's conduct condemned, despite the following facts:

(a) The trial strategy of the defense involved no effort to impeach Bellante's credibility. Instead, the defense stressed his good reputation and sought to rely affirmatively on certain facets of his testimony to convince the jury of respondent's innocence. The substantial impeachment potential of the immunization of Bellante in exchange for his cooperation with the prosecution was wholly ignored, doubtless because it would have undermined respondent's entire line of defense to cast doubt upon Bellante's credibility. In short, the defense made no effort to question Bellante with regard to anything the prosecution had done on his behalf in connection with his cooperation in this case, although the matter "suppressed" by the prosecution would have been readily discoverable by means of a simple question on cross-examination.

(b) There is no allegation whatever that any false or possibly misleading testimony was given with respect to Bellante's motives for testifying.[8]

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inference * * * that at least some of the jurors might have felt that the mere act of writing the letters was preferential treatment by the U.S. Attorney" (App. A, *infra*, p. 11a).

[8] While, as the court of appeals noted (App. A, *infra*, p. 11a), the jury was informed of the fact that Bellante had been immunized, it is wholly unjustified to draw any inference of impropriety from that fact. Knowledge that Bellante was testifying under a grant of immunity was surely far more critical to the jury's assessment of his credibility than the letters whose non-disclosure was held to require a new trial. It seems quite ironic, in light of the rest of the court of appeals' decision, that the prosecutor's care not to "suppress" the fact of immunization was invoked to support the finding that he was guilty of unconstitutional misconduct.

(c) The letters were not part of any inducement offered Bellante to testify as a prosecution witness. By the time the letters were requested and sent, Bellante had already received immunity and testified fully before the grand jury. The record is devoid of any evidence showing that the prosecution asked for or received any consideration or cooperation from Bellante in exchange for writing the letters (App. D, *infra*, pp. 51a-53a).

(d) It is far from obvious that the prosecutor can be blamed for failing to recognize the "exculpatory" nature of these letters. Indeed, placing the letters before the jury would necessarily have entailed apprising the jury of the fact that there was an appreciable risk that Bellante's cooperation with the prosecution would cost his firm important government contracts. It is thus difficult to escape the conclusion that the net effect of the letters would have been to bolster Bellante's credibility by showing that his cooperation was potentially more costly than might otherwise appear.

2. Although purporting simply to apply the standard of prosecutorial responsibility established by *Giglio* v. *United States*, 405 U.S. 150, the court of

appeals' decision in fact represents a fundamental expansion of the obligations previously recognized by this Court in *Giglio* and *Napue* v. *Illinois*, 360 U.S. 264. The court of appeals stated that *Giglio* "makes it clear that, when the reliability of a given witness is critical to a determination of guilt or innocence, non-disclosure of evidence affecting credibility falls within *Brady's* rule" (App. A, *infra*, pp. 8a-9a). While we do not dispute that the prosecutor's disclosure obligations can extend to impeachment material as well as evidence bearing directly on a defendant's culpability, the results in *Giglio* and *Napue* depended upon two critical factors, both of which are absent from the present case: (1) both cases involved perjured testimony by the witness, which the prosecution knew or should have known to be false; and (2) both cases involved promises made to the witness by the government in exchange for his testimony. It is a long step from those circumstances to the conclusion that non-disclosure of "evidence *affecting* credibility" of a key witness violates the prosecutor's obligations—a step which, if taken at all, should be taken by this Court.

Moreover, the expansion of prosecutorial disclosure obligations undertaken by the court of appeals compromises the adversary system of criminal justice. It is surely not unreasonable to place upon the government's shoulders the responsibility to avoid deliberate deception of the trier of fact on a matter of central significance to the determination of guilt or innocence; it is far different, however, to require

the government to disclose all it knows that might "affect" the credibility of a witness, particularly when, as here, the defense has done little to indicate any interest in the material.

As evidenced by the holding in this case itself, the range of potential impeachment materials is broad indeed. It encompasses virtually anything that may have transpired, either orally or in writing, between the witness and government agents, as well as any information, actual or rumored, about the witness's past. The most scrupulous efforts to comply with disclosure obligations will, accordingly, often fall short of satisfying a duty defined to encompass all evidence "affecting" credibility of the government's witnesses.

If these heretofore uncharted waters must be navigated, it is not unreasonable to insist upon some guidance from the defense. While respondent did submit a general request prior to trial for disclosure of material "which may be used to impeach prosecution witnesses" (App. A, *infra*, p. 8a), he never exhibited a focused interest in the negotiations to secure Bellante's testimony, much less in the details of relations between the witness and the prosecutors subsequent to his immunization and testimony before the grand jury. Moreover, the defense asked no questions of the witness at trial designed to explore his motivation in testifying for the prosecution, although it would have been a simple matter to inquire whether the prosecution had done anything on Bellante's behalf as a result of his involvement in the case

(there is, of course, no reason to suppose that such a line of inquiry would have met with false or misleading responses, or, indeed, to speculate that a specific request to the prosecution for material of this sort would have been refused). The nature of the adversary process is materially altered if, as has happened here, the defense is relieved of all duty to inquire into matters of this nature and if, in fact, its lack of diligence is actually rewarded with a grant of a new trial.[9]

3. Not only does the court of appeals' decision represent a material expansion of disclosure obligations heretofore recognized by this Court, but it appears to be inconsistent with this Court's recently expressed views on the scope of a prosecutor's constitutional duties of disclosure (*Imbler* v. *Pachtman*, No. 74-5435, decided March 2, 1976) and is in conflict with the decision of the Second Circuit in *United States* v. *Pfingst*, 490 F. 2d 262, certiorari denied, 417 U.S. 919.

The issue in *Imbler* concerned the susceptibility of a prosecutor to tort liability for knowing use of perjured testimony. While the concurring Justices agreed with the Court that there should be immunity from

[9] The court of appeals stated that the government did not contend that respondent had any knowledge of the letters at or before trial (App. A, *infra*, p. 8a, n. 5). While the issue was not developed before the district court (respondent's motion was rejected without an evidentiary hearing), we do not concede that respondent did not know of or could not in the exercise of due diligence have discovered the existence of the letters.

suit where perjured testimony is involved, they urged a different rule for cases of non-disclosure of evidence. In elaborating this position, Mr. Justice White considered the instance of non-disclosure presented by that case, the fact that a criminal charge based on a bad check written by the witness was outstanding against the witness at the time of trial. Of this fact, which surely "affected" the witness's credibility, he wrote: "* * * [T]he witness had an extensive criminal record which was known to but not fully used by the defense. Thus, even taken as true, the failure to disclose the check charges is patently insufficient to support a claim of unconstitutional suppression of evidence" (slip concurring op. 14-15).[10]

The majority, in responding to the views of Mr. Justice White, exhibited a similarly restrained view of the matter (slip op. 22-23, n.34):

> We further think MR. JUSTICE WHITE'S suggestion * * * that absolute immunity should be accorded only when the prosecutor makes a "full disclosure" of all facts casting doubt upon the State's testimony, would place upon the prosecutor a duty exceeding the disclosure requirements of *Brady* and its progeny, see 373 U.S., at 87; *Moore* v. *Illinois*, 408 U.S. 786, 795 (1972); cf. *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 647-648 (1974). It also would weaken the adversary system at the same time it interfered

[10] The extensive criminal record of the witness in *Imbler* is analogous to the immunization of Bellante here, which similarly was not exploited by the defense.

seriously with the legitimate exercise of prosecutorial discretion.

In *United States* v. *Pfingst*, *supra*, the defense had made a specific request for disclosure of any promises or assurances made to the government's key witness "which could reasonably give [him] hope * * * for lenient treatment as a result of his testimony" (490 F. 2d at 265). The prosecution failed to disclose that in the course of extended dealings between the witness and various prosecutors, assurances had been given that the witness would not be prosecuted for tax evasion or perjury arising out of the bankruptcy fraud matter in which the witness was implicating Pfingst (*id.* at 273). The failure to disclose these assurances was held not to warrant a new trial (*id.* at 275-278). That result is unreconcilable with the result in the instant case and reflects a markedly different view of the prosecution's obligations of disclosure from that delineated by the court of appeals in the instant case.

4. We yield to no member of the legal community in our concern that prosecutors live up to impeccable standards of fairness in the conduct of the government's criminal litigation. We view a charge of deliberate suppression of exculpatory evidence, which the court of appeals found to have occurred here, with the utmost gravity. Respondent, in his petition in this case, variously characterizes the actions of the prosecutors here as an "intentional advertent violation of a defendant's due process rights" (Pet. No. 75-1323, p. 16) and "a frontal assault by the government on

the integrity of the judicial system and the notion of a fair trial" (*id.* at 20). Our careful study of the issues presented by this case convinces us that the prosecutor's action in failing to disclose the letters written on behalf of Bellante is wholly undeserving of this kind of condemnation.

In characterizing the prosecution's non-disclosure as deliberate suppression of evidence, the court of appeals gave controlling weight to the fact that the prosecution was aware of the existence of the Bellante letters; it asserted that its view was in accord with the approach of the Second Circuit (App. A, *infra*, p. 12a). We believe, however, that the concept of "deliberate suppression" ordinarily implies an element of willfulness (at least in the absence of a focused defense disclosure request). If a prosecutor is aware of the existence of certain information and makes an honest decision that he is not required to disclose it, that decision should not be characterized as a deliberate suppression of evidence, and that is precisely the view expressed by the Second Circuit in *Pfingst* (490 F. 2d at 275-276).[11]

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[11] Since there was no hearing on respondent's motion for a new trial, the record is silent as to the nature of the consideration, if any, given to the question of disclosure of the letters. We are advised by the United States Attorney, however, that he believes a hearing would establish that it simply never occurred to any of the prosecutors involved in the case that they might be obligated to disclose the letters, and thus that there was no conscious election of nondisclosure.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

ANDREW L. FREY,
Deputy Solicitor General.

JOHN F. COONEY,
Assistant to the Solicitor General.

APRIL 1976.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 75-1643

UNITED STATES OF AMERICA, APPELLEE

v.

JOSEPH M. MCCRANE, JR., APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(D.C. No. 74-180 Criminal)

Argued October 31, 1975

Before: GIBBONS, *Circuit Judge*, MARKEY,* *Chief Judge of Court of Customs and Patent Appeals* and WEIS, *Circuit Judge.*

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OPINION OF THE COURT

(Filed December 18, 1975)

WEIS, *Circuit Judge.*

Letters written by the United States Attorney to prospective customers of a key government witness constituted *Brady* material which should have been disclosed to the defendant in this criminal case. The failure of the prosecution to do so requires a new trial on the affected counts. Convictions will be affirmed on other charges of aiding the preparation of false income tax returns by deducting political contributions as business expenses.

The defendant was convicted on four counts of violation of 26 U.S.C. § 7206(2), which in general proscribes aiding or advising preparation of fraudulent income tax returns.[1] At the conclusion of the

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[1] The indictment was returned in the District of New Jersey. The first trial began on September 10, 1974, but the court declared a mistrial on September 19, 1974 because of prejudicial publicity. A second trial began in New Jersey on October 21, 1974; however, on the defendant's motion for change of venue, the court transferred the case to the Middle District of Pennsylvania.

government's case, the court dismissed a conspiracy charge and six substantive counts.

At the trial, there was testimony that the defendant solicited political contributions in the course of his duties as finance chairman for a gubernatorial candidate. Fictitious invoices for advertising services were issued in some instances to disguise the payments as business expenses which were then used as deductions on the contributor's income tax returns. This arrangement was effected through the cooperation of Writers Associates, a small public relations firm which the defendant had engaged to assist in his fund raising efforts. In addition to its customary advertising services, Writers agreed to receive campaign donations and, on some occasions, bill contributors for work which had not been performed.

Count III of the indictment was directed at a $2,000.00 contribution which Hialeah Race Course, Inc. made after receipt of Writers' fictitious bills for advertising. Hialeah later deducted the amount on its 1969 Federal Income Tax return as a business expense.

Count IV charged that Trap Rock Industries, Inc. had given a contribution of $15,000.00 to the campaign after Writers Associates had sent invoices for advertising services not rendered. A witness testified that, in soliciting the funds, the defendant had offered to supply fictitious bills from a public relations firm

so that Trap Rock could deduct the contributions as a business expense.

Counts X and XI were based on payments made by Bellante, Clauss, Miller & Nolan, Inc. on separate occasions. Lawrence Bellante, president of the company, testified that in June, 1969 the defendant asked for a campaign contribution. In the course of the conversation, McCrane said that the payment should be made to Bofinger-Kaplan Advertising, Inc. in order to secure a tax deduction. Bellante made a payment of $3,500.00 to Bofinger-Kaplan and deducted part from the corporate income tax. A similar arrangement governed a $2,500.00 payment to Writers Associates.[2]

The defendant raises a number of diverse issues on appeal and we first address the most serious one, the withholding of *Brady* material.

E. Lawrence Bellante was a key government witness against the defendant. Without his testimony there could have been no conviction on Counts X and XI. The guilty verdicts on these two counts, of necessity, demonstrated the jury's acceptance of his credibility.

The trial concluded on December 11, 1974. Four days later, an article appeared in the New Brunswick *Home News* describing the manner in which Bellante had secured a contract to participate in the construc-

[2] For accounts of other disguised contributions during the same campaign, *see* United States v. Gross, 511 F.2d 910 (3d Cir.), *cert. denied*, 44 U.S.L.W. 3258 (U.S. November 4, 1975).

tion of a new sports stadium in New Jersey. Reporting on an interview with Bellante, the article said:

> "Among those who have helped him, he said, is U.S. Atty. Jonathan Goldstein, who has written in his behalf."

The defense immediately brought the matter to the attention of the trial court which then conducted further inquiry. It was discovered that the U.S. Attorney's office had sent a number of letters describing Bellante's conduct in this case to various public and private organizations in New Jersey. The court then ordered production of the letters, eight in all. Six had been sent in the summer and fall of 1973, one in January of 1974, and the last one on January 31, 1975 (some six weeks after the trial concluded).[3] The

[3] Seven of the letters were written before trial and one after trial but before the disposition of defendant's post-trial motions, as follows:

1. June 18, 1973 to John C. Kohl, Commissioner of the New Jersey Department of Transportation;
2. June 21, 1973 to John L. Swink, Senior Vice President and Treasurer of Rutgers University;
3. July 5, 1973 to the New Jersey Sports and Exposition Authority;
4. July 5, 1973 to Milton H. Gelzer, Esquire;
5. July 13, 1973 to Donald S. Howard, President of the Board of Education of the Borough of Rumson, New Jersey;
6. October 16, 1973 to William W. Watkin, Jr., Executive Director of the Delaware River Port Authority;
7. January 8, 1974 to Richard C. Walters, Assistant Counsel, Department of the Navy;
8. January 31, 1975 to Robert G. Donovan, President of the Pennsylvania Society of Professional Engineers (NE Chapter).

letters, some of which were written at the request of Bellante's attorneys and others at the request of the addressee, are substantially identical. The U.S. Attorney's office wrote that Bellante had been granted immunity and had cooperated with the grand jury. Included was the following paragraph:

> "This office brings these facts to your attention for your consideration as to whether Bellante, Clauss, Miller & Nolan, Inc., should be barred from further bidding on state work. On previous occasions we have expressed our concern that individuals that cooperate with the United States Grand Jury pursuant to a grant of immunity should not be penalized for telling the truth. It is in this context that I bring Mr. Bellante's cooperation to your attention for your consideration in reaching a final determination of the matter before you. In the final analysis, this determination must be made by your office and we do not in any way intend to interfere with your discretion in this matter." [4]

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[4] The full text of a typical letter follows:

"June 18, 1973
Commissioner John C. Kohl
Department of Transportation
1035 Parkway Avenue
Trenton, New Jersey 08625

Re: *United States v. Bellante, Clauss, Miller & Nolan, Inc., Cr. No. 345-73*

Dear Commissioner:

I am in receipt of a letter dated June 13, 1973 from the attorneys who represent Bellante, Clauss, Miller & Nolan, Inc. They have advised me that your office will be conducting a hearing on June 21, 1973 relative to the standing of this corporation to bid on public contracts in the State of New Jersey.

This is to advise that one of the principals of this firm, E. Lawrence Bellante, has been immunized by the United States District Court and has furnished valuable testimony to the United States Grand Jury that is currently investigating a scheme to defraud the United States in which contributors to the 1969 Cahill gubernatorial campaign were furnished false and fictitious invoices for non-existent services in order that these contributors could deduct their political contributions as ordinary and necessary business expenses. Mr. Bellante has cooperated fully with the United States Grand Jury and has testified as to his participation in this scheme. Indictments have been returned against Joseph M. McCrane, Nelson G. Gross, as well as Bellante, Clauss, Miller & Nolan, Inc., all emanating from Mr. Bellante's testimony.

This office brings these facts to your attention for your consideration as to whether Bellante, Clauss, Miller & Nolan, Inc., should be barred from further bidding on state work. On previous occasions we have expressed our concern that individuals that cooperate with the United States Grand Jury pursuant to a grant of immunity should not be penalized for telling the truth. It is in this context that I bring Mr. Bellante's cooperation to your attention for your consideration in reaching a final determination of the matter before you. In the final analysis, this determination must be made by your office and we do not in any way intend to interfere with your discretion in this matter.

If there are any further questions that you may have, please do not hesitate to call me.

Very truly yours,"

In the trial court's view, the letters were no more than factual recitations of Bellante's status and the

government had been under no obligation to disclose the correspondence.[5]

The record of the proceedings before trial shows that, in January of 1974, the defendant moved for discovery of *inter alia*:

> "[A]ll material known to the government . . . which is exculpatory in nature or favorable to the defendant, or may lead to the discovery of exculpatory material or material which may be used to impeach prosecution witnesses . . . ."

In reply, the government acknowledged its "continuing obligations" under *Brady* v. *Maryland*, 373 U.S. 83 (1963), to disclose any material that would exculpate the defendant or negate his guilt: "However, the Government does not know of any exculpatory material." At a hearing in April of 1974, the presiding judge, in ruling on discovery of *Brady* material, addressed the government attorney:

> "Let me put it this way to you, . . . [i]f there is anything of a questionable nature, you should put it aside and let me review it in camera, and I'll decide."

Under *Brady* v. *Maryland*, *supra*, the suppression of material evidence by the government requires that a new trial be ordered regardless of good or bad faith on the part of the prosecution. *Giglio* v. *United States*, 405 U.S. 150 (1972), makes it clear that, when the

[5] The government does not contend that the defendant had any knowledge of these letters until the newspaper story was published. We assume, therefore, that he did not.

reliability of a given witness is critical to a determination of guilt or innocence, non-disclosure of evidence affecting credibility falls within *Brady's* rule. *See also Napue* v. *Illinois*, 360 U.S. 264 (1959); ABA STANDARDS, DISCOVERY AND PROCEDURE BEFORE TRIAL § 2.1 (1970); ABA STANDARDS, THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION § 3.11 (1971).

A promise of preferential treatment given to a witness by the government is admissible for impeachment purposes. *United States* v. *Harris*, 498 F.2d 1164, 1169 (3d Cir. 1974); *United States* v. *Newman*, 490 F.2d 139, 146 (3d Cir. 1974).

However, not all impeachment matter must be disclosed; the obligation extends only to that which is material. Cases in this court have framed the test in terms of that which is reasonably likely to have changed the jury's judgment. *United States* v. *Harris*, *supra*; *United States ex rel. Dale* v. *Williams*, 459 F.2d 763 (3d Cir. 1972).[6] Consideration must be

[6] The Court of Appeals for the Second Circuit applies a test which depends on whether the "suppression" of *Brady* material is deliberate of inadvertent. Judge Gibbons, sitting by designation, recently summarized the Second Circuit's position in United States v. Hilton, 521 F.2d 164, 166 (2d Cir. 1975):

> "If the government deliberately suppresses evidence or ignores evidence of such high value that it could not have escaped its attention, a new trial is warranted if the evidence is merely material or favorable to the defense. But if the government's failure to disclose is inadvertent, a new trial is required only if there is a significant chance that this added item, developed by skilled counsel,

given to the witness' testimony, that is, whether it is merely corroborative, *United States ex rel. Dale* v. *Williams*, *supra* at 765, or essential, *Giglio* v. *United States*, 405 U.S. at 154-155.

Accordingly, the absence of the impeachment matter is material if the information which the government withholds tends to impair seriously the reliability of the only witness whose testimony carries the case to the jury.[7] In such circumstances, the failure to disclose goes to a matter reasonably likely to affect the judgment of the jury. *Giglio* v. *United States*, *supra*.

The district court reasoned that the government's failure to disclose did not deny the defendant's right to a fair trial because the letters were not "favorable" within the meaning of *Brady*. The letters were

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could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction."

See United States v. Rosner, 516 F.2d 269 (2d Cir.), *petition for cert. filed*, 44 U.S.L.W. 3207 (U.S. September 29, 1975) (No. 75-492); United States v. Sperling, 506 F.2d 1323, 1333 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975); United States v. Kahn, 472 F.2d 272, 287 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973); United States v. Miller, 411 F.2d 825, 832 (2d Cir. 1969); United States v. Keough, 391 F.2d 138, 147-148 (2d Cir. 1968).

The result we reach in this case would be the same under either our cases or those listed above.

[7] At the conclusion of the prosecution's case, the court granted acquittal for each count where there was no evidence of communication between the defendant and the contributor. Bellante supplied the only such evidence as to Counts X and XI.

characterized as factual recitations which contained no evidence of any understanding between Bellante and the United States Attorney's office or expectation of favors in exchange for cooperation. We agree that this is a reasonable interpretation of the letters, and one which the jurors *might* have accepted. However, we cannot exclude the other inference, just as reasonable, that at least some of the jurors might have felt that the mere act of writing the letters was preferential treatment by the U.S. Attorney.

Although the letters were couched in neutral tones, cross-examination might have revealed whether they were, in fact, helpful to Bellante in securing or retaining profitable contracts for his firm. Presumably, there had been some discussion between the United States Attorney's office and Bellante or his attorneys before the letters were sent. The substance of those conversations might be important in evaluating Bellante's reliability as a witness.

The impact of impeachment evidence is usually affected by the atmosphere created by the direct examination. It is helpful to review the trial record in order to put the undisclosed information in the proper perspective.

The United States Attorney began his direct examination of Bellante by reminding him of his immunization and his continuing obligation to testify truthfully. At the outset, therefore, the jurors might have inferred that Bellante was a reluctant witness. This impression would have been fortified by the witness' statements on cross-examination that the tax deduc-

tion had been inadvertent on his part and that he had been friendly with the defendant. It is difficult to predict the reaction of the jury if, at that point, the letters written by the United States Attorney's office had been brought to their attention. The letters perhaps might have had no effect; but undeniably they could have shown that the witness, rather than being hostile to the prosecution, was in fact cooperative and financial self-interest was involved.

Of course, we do not pass upon the witness' credibility: that important task is reserved for the jury. The error here was the government's withholding of material which would have assisted the defendant in casting doubt on the credibility of a crucial witness against him.

Furthermore, were we to apply the test used in the Second Circuit, it would be pertinent to note that the government does not assert inadvertence. Indeed, it could not because the last of the letters written before trial was signed by the Assistant United States Attorney who actually tried the case. Accordingly, the trial was not one which owed its imperfection to negligence or inadvertence. To the contrary, this is a situation where the prosecution chose to ignore the sage admonition of the pretrial judge and took it upon itself to decide a serious legal question adversely to the defendant. To remedy the government's error, we must order a new trial on Counts X and XI.

The defendant has asserted a number of other grounds applicable to all counts:

1. The judgment of acquittal for conspiracy to violate 26 U.S.C. § 7206(2) precludes conviction for aiding and assisting others in violating 26 U.S.C. § 7206(2).

We find no merit to this contention. As the district court noted in its post-trial memorandum, the alleged conspiracy involved different people from those in the substantive counts. It is clear that failure to prove a conspiracy among A, B and C does not preclude a conviction on a count that A aided Y in committing a substantive offense. *See Nye & Nissen* v. *United States*, 336 U.S. 613, 619-620 (1949).

2. The indictment was improperly amended.

The substantive counts described the illegal activity and included the language: "Pursuant to the plan and purpose to commit the crime set forth in Count I [the conspiracy count] of this indictment . . . ." The trial judge correctly held that this phraseology was surplusage and did not include the challenged verbiage in his instruction to the jury. He committed no error in that respect. *See United States* v. *Musgrave*, 483 F.2d 327, 337 (5th Cir.), *cert. denied*, 414 U.S. 1023 (1973). The quoted language did not set forth an essential element of the crime, nor did its deletion affect the charges brought by the grand jury in any substantial manner. *United States* v. *Gross*, 511 F.2d at 916; *United States* v. *Radowitz*, 507 F.2d 109, 112 (3d Cir. 1974); *United States* v. *Somers*, 496 F.2d 723 (3d Cir.), *cert. denied*, 419 U.S. 832 (1974);

United States v. *DeCavalcante*, 440 F.2d 1264, 1271 (3d Cir. 1971).

The defense contends that the indictment was "amended" by preparing for the jury's use an edited version not containing the phraseology quoted or the counts which had been dismissed. This contention has no basis. The document which was sent out with the jury was not *the* indictment; it was simply a memorandum to aid the jury's deliberation. The mere preparation of a redacted version or a "clean copy" of an indictment is not an amendment. *See Dawson* v. *United States*, 516 F.2d 796, 801 (9th Cir. 1975); *United States* v. *Cirami*, 510 F.2d 69 (2d Cir.), *cert. denied*, 421 U.S. 964 (1975); *United States* v. *Bryant*, 471 F.2d 1040 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1112 (1973).

3. The defendant could not be prosecuted under § 7206(2) since that section is applicable only to accoutants, bookkeepers, tax consultants, or preparers who actually prepare the tax returns.

While the defendant cites a litany of cases where persons in those categories were convicted, that compilation does not establish the narrow reading of the staute which he urges.

The defendant was convicted on evidence that he assisted certain taxpayers by providing false invoices as documentation of business expenses. He also advised and counseled the contributors to use these expenditures as tax deductions. His activities fall within the statutory proscription of conduct by an individual

who "wilfully aids or assists in, or procures, counsels or advises the preparation . . . of a return . . . which is fraudulent or false as to any material matter." *See United States* v. *Haimowitz*, 404 F.2d 38 (2d Cir. 1968); *Rubenstein* v. *United States*, 214 F.2d 667 (10th Cir. 1954).

4. Insufficiency of the evidence.

Count III charged that the Hialeah Race Course, Inc. income tax return showed $2,000.00 paid for services purchased from Writers Associates when that sum, in fact, was a non-deductible political contribution. The evidence established that the defendant, who was then vice president of the corporation which controlled Hialeah, gave express instructions for the payment.

The evidence under Count IV was that the defendant told an official of Trap Rock Industries that he would furnish fictitious invoices to facilitate the deduction of the political contribution as a business expense. The deduction was in fact taken in Trap Rock's return in 1969.

The district court reviewed the evidence at length and in detail. We agree with its conclusion that the evidence was sufficient to support conviction. Since Counts X and XI must be retried, we will not pass upon the evidence as to them.

5. Errors in the charge.

Before the court began its instructions to the jury, the defense asked the trial judge to admonish the jury

about the counts which had been dismissed and the evidence pertaining to them. The court charged:

> "In deciding this case, members of the jury, you are to consider each count individually. The fact that the Government has proved its case beyond a reasonable doubt or has failed to prove its case beyond a reasonable doubt as to any single count does not in and of itself require a finding of either guilty or innocent as to any other count. It is your obligation and duty to consider each count individually and arrive at a separate finding of guilty or innocent as to each of the four counts in the indictment. And as to each count you are to determine guilt or innocence only on the evidence that applies to that particular count."

Defendant took no exception to that part of the charge nor did he request any amplification of the instruction. Accordingly, we find no reversible error.

Defendant also contends that the court erred in its charge on knowledge and willfulness on the part of the defendant. We have reviewed the charge and find it adequate.

Finally, the defendant asserts that, because the court had ruled that the size of the tax deductions was not material, his closing argument was unduly limited on that issue. We find no reversible error in this respect.

After the briefs were filed and a few days before argument was scheduled in this case, the defendant filed a motion for leave to enlarge the record or, in the alternative, for a remand to the district court for

an evidentiary hearing. In support of the motion, he stated that on October 15, 1975 a grand jury returned an indictment against the former president of Trap Rock, including a count reciting the filing of a false corporate tax return in 1969.

One of the defenses to Count IV was that the defendant McCrane had not induced Trap Rock to deduct political contribuitons because it was well familiar with the practice and had followed it on numerous other occasions. According to the defendant's motion, the latest indictment suggests that the government was aware of tax fraud on the part of Trap Rock independent of the activity involving this defendant. The defense asserts, therefore, that the government's knowledge of Trap Rock's alleged fraud was *Brady* material which was not disclosed before the trial.

We deny the motion. Since these allegations are relevant to the establishment of cause for a new trial, the motion should be filed in the district court. *See* 2 C. WRIGHT FEDERAL PRACTICE AND PROCEDURE § 557 (1969). Our denial is without prejudice to any action which the defendant may wish to take in the district court. We do not pass upon and, hence, express no opinion on the merits of the motion.

The conviction on Counts X and XI will be vacated and these matters remanded for a new trial. The convictions on Counts III and IV are affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1643

UNITED STATES OF AMERICA

vs.

JOSEPH M. McCRANE, JR., APPELLANT

(D.C. Criminal No. 74-180)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Present: GIBBONS, *Circuit Judge* and MARKEY*, *Chief Judge, Court of Customs and Patent Appeals,* and WEIS, *Circuit Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed May 13, 1975, be, and the same is hereby affirmed with regard to convictions on

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* Chief Judge, Court of Customs and Patent Appeals, sitting by designation.

Counts III and IV; and it is further ordered that the convictions on Counts X and XI are vacated and these matters are remanded for a new trial, in accordance with the opinion of this Court.

ATTEST:

s/ Thomas F. Quinn
CLERK

December 18, 1975

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1643

UNITED STATES OF AMERICA, APPELLEE

v.

JOSEPH M. McCRANE, JR., APPELLANT

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*, and MARKEY, *Chief Judge of the Court of Customs and Patent Appeals.*

The petition for rehearing filed by
Appellee

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ Joseph F. Weis, Jr.
Judge

Dated: February 11, 1976

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA

No. 74-180 Criminal

UNITED STATES OF AMERICA

v.

JOSEPH M. McCRANE, JR.

MEMORANDUM AND ORDER

Defendant was found guilty by a jury on December 11, 1974 on four counts of aiding or assisting in the preparation of federal income tax returns that were false or fraudulent as to a material matter, in violation of 26 U.S.C. § 7206(2).[1] He now moves for a judgment of acquittal notwithstanding the jury verdict, or, in the alternative, for a new trial. What follows immediately is a general summary of the facts surrounding defendant's indictment and trial.

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[1] "Any person who . . . [w]illfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim or document . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution."

A more detailed description of the facts relevant to each ground offered in support of the motions will be provided in connection with the discussion of each ground.

On May 24, 1973, an indictment was returned against the defendant in the District of New Jersey alleging that he had committed several criminal acts during the time he was Finance Chairman for the 1969 New Jersey gubernatorial campaign of William T. Cahill. More particularly, Count I of the indictment charged a conspiracy among the defendant, four unindicted co-conspirators and others to defraud the United States by aiding and assisting several taxpayers to prepare fraudulent income tax returns. Essentially, the *modus operandi* charged in Count I was that the defendant and his co-conspirators had conspired to violate 26 U.S.C. § 7206(2) by furnishing fictitious invoices to the taxpayers in question so that they could disguise their contributions to the Cahill campaign as business expenditures in order to be able to subsequently deduct the amounts so contributed as ordinary and necessary business expenses on their income tax returns. Counts II through XI of the indictment charged the defendant with ten substantive violations of 26 U.S.C. § 7206 (2), each count alleging an instance of the defendant aiding or assisting a taxpayer to prepare a fraudulent income tax return in the manner just described. Following several pretrial motions, defendant's trial commenced on September 10, 1974 before the Honorable Lawrence A. Whipple in the District of New

Jersey. On defendant's motion, that trial ended in a mistrial on September 19 because of the effect of prejudicial publicity on the jurors.[2] Thereafter, a second trial commenced in the District of New Jersey on October 21, 1974, but that also ended prematurely when the Court granted the defendant's motion for a change of venue on October 25, and venue was transferred to the Middle District of Pennsylvania. Pursuant to the change of venue, trial commenced in this Court on December 2, 1974. At the conclusion of the government's case, the defendant's motion for a directed judgment of acquittal was granted with respect to the conspiracy count and six of the ten substantive counts of the indictment. Thereafter, the jury convicted the defendant on the remaining four substantive counts.

JUDGMENT OF ACQUITTAL

The defendant offers four arguments in support of his motion for judgment of acquittal: (1) under the doctrine of collateral estoppel, the judgment of acquittal on the conspiracy count directed by the Court

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[2] The pertinent circumstances of the mistrial are as follows: On September 19, 1974, a juror reported that he had cut out a newspaper article, the headline of which related to a previous mistrial motion by defendant being denied by the Court. He stated that he had done this to prevent other jurors from reading the article. It was then discovered, during a *voir dire* of this juror, that another juror had previously brought into the jury room an article regarding a mistrial in a prior state trial against the defendant, and had shown this article to other jurors. Defense counsel then moved again for a mistrial and the Court granted the motion.

at the close of the government's case precluded conviction on the substantive aiding and assisting counts; (2) he was improperly prosecuted under 26 U.S.C. § 7206(2); (3) there was insufficient evidence introduced at trial to warrant a conviction; and (4) the indictment should have been dismissed because of improper influences on the grand jury. The arguments will be addressed *seriatim*.

1. *Collateral Estoppel*

As mentioned above, the indictment in this case consisted of eleven counts, the first charging a conspiracy to violate 26 U.S.C. § 7206(2), and the remaining ten averring substantive violations of that statute. Count I described the alleged conspiracy in great detail, setting out with specificity the plan to facilitate the raising of campaign funds by furnishing contributors a means of disguising their contributors as business expenditures in order to be able to deduct them later on their income tax returns as ordinary and necessary business expenses. In addition to the defendant, Count I named four unindicted co-conspirators: Richard H. Smith Associates, Inc., a public relations firm trading as Writers Associates (Writers Associates); Richard H. Smith, the president of Writers Associates; Suzanne Phillips Miller, an employee of Writers Associates; and Nelson G. Gross, the Chairman of the New Jersey State Republican Party. (Gross's name was deleted from the indictment prior to the New Jersey trial and was not contained in the indictment under which defend-

ant was tried before this Court.) Counts II thru XI then charged ten substantive violations of 26 U.S.C. § 7206(2), and, in describing the substantive offense, each of the remaining counts stated that it was "pursuant to the plan and purpose to commit the crime set forth in Count I of this indictment[.]" [2] Pointing to the quoted language, the defendant now argues that it was an essential element of each of the substantive counts that the unlawful aiding and assisting was pursuant to an overall plan to violate

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[2] Count III is illustrative:

"1. Paragraph 1 of Count I is hereby realleged and incorporated herein as though set forth in full.

2. The defendant, JOSEPH M. McCRANE, JR., between on or about the 1st day of January, 1969, and on or about the 10th day of June, 1970, in the District of New Jersey, pursuant to the plan and purpose to commit the crime set forth in Count I of this indictment, did wilfully, knowingly and unlawfully aid and assist Hialeah Race Course, Inc. to prepare and present to the District Director of Internal Revenue for the Internal Revenue District of Jacksonville, Florida, a 1969 United States Corporation Income Tax Return for the corporate fiscal year ending March 31, 1970, which was false and fraudulent as to a material matter in that it included the payment of $2,000.00 to the firm of Writers Associates as a services purchased expense, whereas, as the defendant, JOSEPH M. McCRANE, JR., well knew, this deduction was not an ordinary and necessary business expense, but was in fact a political contribution which the defendant had procured for the 1969 gubernatorial campaign of William T. Cahill and which the defendant JOSEPH M. McCRANE, JR. knew and believed was not tax deductible.

In violation of Title 26 United States Code, Section 7206(2) and Title 18, United States Code, Section 2."

Section 7206(2), and that the Court's ordering of a directed judgment of acquittal on the conspiracy count on the ground that there was no evidence of an agreement among the alleged co-conspirators to violate the statute precluded conviction on the substantive counts. The defendant's theory is that the holding that there was no evidence of a plan to violate the statute collaterally estopped the government from asserting an essential element of the substantive counts, viz., that the unlawful aiding and assisting was pursuant to the overall plan to violate the statute alleged in Count I. Sealfon v. United States, 332 U.S. 575 (1948) (Defendant had been acquitted at a previous trial of having conspired with one Greenberg to defraud the United States by presenting false invoices and making false representations to a ration board to the effect that certain sales of sugar products were made to exempt agencies. That acquittal was held to provide him with a valid *res judicata* defense to a subsequent charge of having aided and abetted Greenberg in the commission of the same substantive offenses that had been alleged in connection with the conspiracy).

While the defendant is correct in his description of the ground of the directed judgment of acquittal on the conspiracy count in this case, viz., that the government presented no evidence of an unlawful agreement among the alleged co-conspirators, he is incorrect in his characterization of this indictment as requiring proof that each count of unlawful aiding and assisting was pursuant to an overall plan to

violate the statute in order to sustain a conviction on the substantive counts. For that reason, his collateral estoppel argument must be rejected.*

At the outset, it is clear that it is proper for the government to charge a conspiracy to violate the law in one count of an indictment and separately charge a substantive violation which was an object of the conspiracy. See Pinkerton v. United States, 328 U.S. 640, 643 (1946). Furthermore, acquittal on a charge of conspiracy is generally not a bar to prosecution and conviction of the substantive crime, even when that was the single overt act mentioned in the conspiracy count. See United States v. Wexler, 79 F. 2d 526, 528 (2d Cir. 1935). Under certain circumstances, however, an acquittal on a conspiracy count may foreclose prosecution and conviction on the substantive counts, as, for example, when the acquittal necessarily establishes that a fact essential for a conviction of the substantive count does not exist. United States v. Sealfon, *supra*. The de-

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* Defendant's argument with respect to the language of the indictment aside, it is clear that the *Sealfon* rule does not apply to this case. The alleged conspiracy involved the defendant, Smith, Miller and Gross, while the substantive charges involved the defendant and various corporations and corporate officers. The dismissal of the conspiracy count because there was no evidence of an unlawful agreement among the defendant and the alleged co-conspirators bore no relationship to the substantive counts, which accused the defendant, independently of Smith, Miller and Gross, of assisting others to submit fraudulent returns. In other words, the unlawful agreement alleged in Count I was not an essential element of the substantive offenses alleged in Counts II through XI.

fendant seeks to bring this case within the *Sealfon* rule by arguing that the language "pursuant to the plan and purpose to commit the crime set forth in Count I of this indictment . . ." adds an element to the offense charged. That language, however, is not an essential part of the indictment in this case, but is instead a mere descriptive reference to the conspiracy count included in order to facilitate an understanding of the substantive counts charged by providing them with a frame of reference. It was not an essential element of the crime charged in the indictment and does not constitute an enlargement of the statutory language of 26 U.S.C. § 7206(2). As such it was mere surplusage with respect to the indictment in this case, and could have been stricken from that document without rendering the charge inadequate. See Brady v. United States, 24 F. 2d 397, 399 (8th Cir. 1928). Indeed, the language was deleted when the indictment was redrafted by counsel for both parties following the directed judgment of acquittal in order to remove any reference to the counts no longer before the jury, and the Court read the redrafted indictment, specifically Count III, in the charge to the jury. Since proof of a plan or an agreement was not an essential element of the substantive aiding and assisting counts, the directed judgment of acquittal on the conspiracy count did not preclude conviction on the substantive counts.

2. *Prosecution Under 26 U.S.C. § 7206(2)*

The defendant makes a two-pronged argument that his prosecution under 26 U.S.C. § 7206(2) was improper. He argues first, as a matter of statutory construction, that the statute was not intended to, and does not in fact, apply to the conduct with which he was charged. In the alternative he maintains that if the statute is construed as applying to that conduct, it is void for vagueness. Both contentions are without merit.

With respect to the statutory construction argument, it is defendant's position that the conduct with which he was charged (a charge, incidentally, which was supported by sufficient evidence introduced at trial, see *infra*) does not amount to a violation of Section 7206(2). Essentially that conduct was that the defendant provided fictitious invoices to certain corporations to enable them to disguise their political contributions as ordinary and necessary business expenses, and that he advised executives of those corporations to deduct for tax purposes their political contributions by expensing them with the fictitious invoices. In support of his contention that this conduct does not come within the statute, the defendant argues that the statute is limited to persons who directly affect the preparation of tax returns or other Internal Revenue Service (IRS) documents by falsifying or counseling and procuring the falsification of items in the actual tax return or other IRS documents. Thus, defendant maintains, the statute is only applicable to accountants, bokkeepers, tax consultants or persons who actually prepare tax returns, who are responsible for the books and records of the taxpayer who filed the return, or who cause

the tax return to be filed. His conduct is too attenuated and remote from the actual preparation of any tax returns or other IRS documents, he concludes, and thus does not come within the purview of the statute.

Although defendant cites numerous cases involving Section 7206(2) prosecutions of persons to whom he contends the statute is limited, i.e., accountants, bookkeepers, tax consultants or preparers, he offers no case which holds that the statute is confined to prosecutions of those classes of individuals.[5] By the same token, there does not seem to be any reported case which has held conduct identical to defendant's to be within the scope of the statute in the face of a contention to the contrary.[6] Nevertheless, the mere

[5] Indeed, his suggestion that Section 7206(2) prosecutions can only be directed against those who actually engage in the preparation of a false tax return is belied by the case on which he most heavily relies, Rubenstein v. United States, 214 F.2d 667 (10th Cir. 1954). In *Rubenstein* the court examined the sufficiency of the evidence to determine whether the defendant husband had caused to be made a false report of income upon which an accountant relied in preparing the defendant's wife's income tax return. Because the report was in fact not false and the defendant had no other contact with the accountant, the court ruled that a judgment of acquittal be entered. Rubenstein v. United States, *supra*, at 670. The case implies, however, that if the report prepared by the husband had been false, there would have been sufficient evidence to uphold his conviction, even though he had not participated in the actual preparation of the return.

[6] Although United States v. Gross, —— F.2d —— (3d Cir. 1975) (opinion filed February 19, 1975) involved a defendant who was convicted of violating Section 7206(2) by conduct substantially the same as defendant's in this case, the issue of whether such conduct is within the scope of the statute does not appear to have been raised in that case. Nevertheless, not all of the reported cases dealing with Section 7206(2) deal with conduct as limited as that to which defendant would confine the statute's application. *See, e.g.*, United States v. Haimowitz, 404 F.2d 38 (2d Cir. 1968) (Defendants, as parimutuel twin double winners at two New York race tracks, were required to report their names and the amount of their winnings to the race track in order that the track could file an Internal Revenue Service information return, Form 1099, which is required by 26 U.S.C. § 6041(a). Instead, they paid others to pick up their winnings and report their names to the track, thereby preventing their own names and winnings from being included on the returns that were filed by the tracks. They were convicted of violating Section 7206(2) for having aided and assisted the race tracks to file returns that were false or fraudulent as to material matters.).

fact that no court has previously considered the question does not mean that the defendant's conduct is not within the purview of the statute. The key questions are whether the defendant's conduct falls within the language and the legislative purpose of Section 7206(2), and the answer to both is that it does.

The statute provides in pertinent part that whoever "[w]illfully aids or assists in, or procures counsels, or advises the preparation . . . of a return . . . which is fraudulent or is false as to any material matter" shall be guilty of an offense against the United States. Defendant assisted certain corporate executives and their corporations by furnishing them with false invoices which provided documentary support for claiming business deductions on their corporate tax returns which were not truthful. Fur-

thermore, he counseled and advised those corporations to falsify their tax returns by claiming what were actually political contributions as ordinary and necessary business expenses. In both respects his conduct clearly falls within the wording of the statute.

In addition, defendant's conduct fails within the statutory purpose of Section 7206(2) because it constitutes an evil which the statute was enacted to prevent. 26 U.S.C. § 7206 is in essence a perjury statute designed to punish the intentional falsification of tax returns and other IRS documents. Section 7206(1) is directed at persons who falisfy their own returns, while 7206(2) deals with those who aid others in falsifying their returns. Section 7206 (1) has been held to apply to any intentional falsification of a return, regardless of the tax consequences of the falsehood. United States v. Divarco, 343 F. Supp. 101 (N.D. Ill. 1972), aff'd, 484 F. 2d 670 (7th Cir. 1973), cert. denied, 415 U.S. 919 (1973) (falsifying one's source of income, as distinguished from the amount of income, held to be a violation of Section 7206(1)). In the context of that decision, the court in *Divarco* stated that a basic rationale of the statute is to insure "truthful representation as to all matters, [without which] it becomes administratively more difficult, if not impossible, for the Internal Revenue Service (IRS) to compute the amount of tax due or to check on the accuracy of returns. . ." *Id.*, at 103. That rationale applies equally to Section 7206(2). The defendant, by assisting the preparation of false tax returns in the manner charged and proven in this case, made it difficult for the government to discover that deductions taken for business expenses were in reality political contributions, thereby obstructing the government in determining the accuracy of the tax returns filed by the corporations involved in this case. That conduct is clearly embraced by the legislative purpose of Section 7206(2). I conclude, therefore, that the defendant's conduct constituted a violation of the statute.

The contention that Section 7206(2) is unconstitutionally vague if construed to apply to his conduct is totally without merit. While the reach of the statute is broader than the strict confines the defendant would impose on it by limiting its application to conduct directly involved with the actual preparation of tax returns, *see supra*, such breadth does not even approach the degree of imprecision that must be found in a statute in order for it to be held unconstitutionally vague. *See* Grayned v. City of Rockford, 408 U.S. 104 (1972). *Cf.* Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). The only basis on which the defendant argues that the statute is impermissibly vague is the application of the phrase "aids or assists" to conduct other than that directly related to the actual preparation of tax returns. He maintains that if the statute is not limited to assisting in the actual preparation, it will not furnish fair warning of what conduct is prohibited and, consequently, will be capable of trapping every

innocent "individual who supplied an invoice, bill or receipt to another person or corporation that later used these items to document a false or fraudulent expense in their tax returns." Defendants' Brief, p. 38. The defendant overlooks the requirement of a finding of willfulness which the statute expressly imposes. To satisfy this requirement, the jury had to find beyond a reasonable doubt that the defendant's conduct was done "voluntarily and intentionally and with a specific intent to do something the law forbids." Notes of Testimony (N.T.), Vol. VIII, p. 33. In the context of Section 7206(2) and this case, the jury had to find that the defendant acted with the specific intent to help three corporations file false and fraudulent income tax returns. Particularly in view of the requirement of willfulness, therefore, the statute provides ample warning of what conduct is prohibited and is not impermissibly vague.

3. *Sufficiency of the Evidence*

The defendant's first two arguments with respect to the sufficiency of the evidence have already been disposed of. They are (a) that there was no evidence that the defendant's conduct was pursuant to an overall plan to violate the statute, and (b) that there was no evidence that he participated in the actual preparation of the tax returns of the corporations involved in this case. As has already been noted, it is not an element of a Section 7206(2) violation that the unlawful conduct be pursuant

to a plan to violate the statute, and the application of the statute is not confined to the actual preparation of tax documents. Accordingly, defendant's contention that the evidence must show such a plan and the defendant's participation in the preparation of the tax returns must be rejected.

What the evidence must show in order to support the defendant's conviction in this case is that he (a) willfully (b) aided or assisted in, or procured counseled, or advised (c) the preparation or presentation of tax returns (d) that were false or fraudulent as to a material matter. Bearing in mind that in evaluating the sufficiency of the evidence to support a conviction the court must take a view of the evidence most favorable to the government. United States v. Pratt, 429 F.2d 690 (3d Cir. 1970), together with all inferences which may reasonably be drawn from the facts, United States v. Martinez, 486 F.2d 15, 23 (5th Cir. 1973), a review of the evidence presented at the trial in this case demonstrates that it amply supports the defendant's conviction.

With respect to Count III of the indictment, which charged the defendant with having aided and assited Hialeah Race Course, Inc. (Hialeah) in filing a false 1969 corporate income tax return, the evidence revealed the following. On two occasions in 1969, once during the primary and again during the general New Jersey gubernatorial campaign, the defendant caused Writers Associates to send an invoice in the amount of $1,000.00 to Hialeah, even though

he knew that Writers Associates did not perform the services indicated in the invoice. Writers Associates subsequently received two $1,000.00 checks from Hialeah, and, pursuant to the defendant's instructions, the proceeds from those checks were used for campaign expenses. The evidence showed further that the invoices in question were paid pursuant to the express instructions of the defendant, who was the Vice President and General Manager of Garden State Racing Association which, in turn, owned a controlling interest in Hialeah. Finally, the evidence disclosed that the two $1,000.00 checks were recorded on Hialeah's books as a services purchased expense and deducted on its 1969 corporate income tax return as an ordinary and necessary business expense.

The evidence with respect to the remaining counts on which the defendant was convicted was at least as strong as the evidence with respect to Count III. Count IV charged the defendant with having aided and assisted Trap Rock Industries, Inc. (Trap Rock) to file a false 1969 corporate income tax return. The evidence showed that the defendant, in an effort to solicit a substantial political contribution from Trap Rock, advised its officers that he could provide them with false business invoices which would enable the corporation to disguise its political contribution as a business expense in order to be able to deduct it on its tax return, thereby paying the contributions "with 50 cent dollars rather than whole dollars" N.T., Vol. V, p. 10; that he knew Writers Associates did not perform the services represented by those invoices;

that Trap Rock paid the invoices with two checks the proceeds of which were used for campaign expenses; and that Trap Rock carried the checks on its books as an advertising expense and deducted them on its 1969 tax return as an ordinary and necessary business expense. Counts X and XI alleged that the defendant aided and assisted Bellante, Clauss, Miller and Nolan, Inc. (Bellante, Clauss) to file false corporate income tax returns for the years 1968 and 1969. (Count X pertained to the 1968 return and Count XI to the 1969 return). The evidence showed that the defendant solicited substantial political contributions from Bellante, Clauss by advising E. Lawrence Bellante, the President of that firm, that he could provide him with false invoices that could be used by the firm as the basis for deducting political contributions as ordinary business expenses; that he caused Writers Associates and another advertising firm, Bofinger-Kaplan, Inc., to send invoices to Bellante, Clauss in a total amount of $6,000.00, even though he knew neither advertising firm performed the services for Bellante, Clauss represented by the invoices; that Bellante, Clauss paid the invoices and that the proceeds of its payments were used for campaign expenses; and that Bellante, Clauss treated the $6,000.00 on its books as an advertising expense and deducted portions of that amount on its 1968 and 1969 income tax returns.

In sum, the evidence presented at trial was more than sufficient to support the conviction on each of the four counts. The defendant's theory, as evi-

denced by his cross examination of the government witnesses and the argument of counsel,[7] was that he supplied the corporations with false invoices in order to preserve their anonymity as contributors, and that he advised the corporate executives to deduct their political contributions as ordinary and necessary business expenses on their income tax returns because he was under the impression that such contributions could be so deducted. The jury obviously rejected his theory.

Nevertheless, in spite of the abundance of evidence introduced against him at trial, the defendant argues that the evidence was insufficient in two respects. He argues first that there was no evidence that he knew that a fraudulent return was ever filed by each of the corporations in question. This contention is similar to the argument that there had to be evidence of direct participation in the actual preparation of the returns, and must be rejected for the same reason, i.e., it misconceives the essence of a Section 7206(2) violation, which is the providing of assistance or advice with a view to the eventual preparation or presentation of a false or fraudulent IRS document. While the offense may not be completed until the document is actually prepared or presented, see United States v. Habig, 390 U.S. 222, 223 (1968), direct participation by the defendant in that preparation or presentation, or knowledge on the part of the defendant of when the document was

[7] The defendant did not testify in his own behalf, nor did he present any witnesses to testify in his behalf.

in fact prepared or presented is not an essential element of a Section 7206(2) offense, and evidence of such participation or knowledge is not necessary to support a conviction under the statute.

Defendant next argues that there was no evidence that he knew that the deductions taken by the corporations were not ordinary and necessary business expenses; that is, assuming that he knew that the firms were planning to deduct their contributions to the Cahill campaign as ordinary and necessary business expenses, there was no evidence that he knew that political contributions are not tax deductible. In essence, he argues that there was insufficient evidence of willfulness to support his conviction.

In order for the jury to find that the defendant acted willfully within the meaning of the statute, they had to find that he acted "voluntarily and intentionally and with the specific intent to do something the law forbids. That is to say, with bad purpose either to disobey or disregard the law." N.T., Vol. VIII, p. 33. *See* United States v. Malinowski, 472 F.2d 850, 853 (3d Cir. 1973). Mindful that direct proof of the unlawful intent is not necessary and that willfulness may be established from all the facts and circumstances surrounding the case, United States v. Barnes, 313 F.2d 325 (6th Cir. 1963), there was ample evidence in this case from which the jury could properly conclude that the defendant acted willfully within the meaning of the statute. The evidence showed that the defendant advised corporate executives that he would furnish them a

device whereby they could disguise their political contributions as business expenses in order to be able to later deduct them on their income tax returns; and that he caused two public relations firms to provide the corporations with fictitious invoices in the amount of their political contributions, which were later used to expense those contributions as business expenses. The jury could properly infer that the defendant used this scheme because he knew that political contributions were not deductible and that the corporations would not be able to deduct their contributions to the Cahill campaign unless they had a means of disguising those contributions as legitimate business expenses. Furthermore, testimony regarding defendant's conversations with several of the witnesses furnished an additional basis upon which the jury could properly infer guilty knowledge and willfulness. On the one hand, according to the testimony of Smith and Miller, the defendant informed them that the fictitious invoices should be sent in order to preserve the anonymity of the contributors, with no mention that the invoices were for tax purposes. Indeed, Smith testified that when he expressed concern to the defendant because of the fund-raising methods, the defendant informed him that the sending of the fictitious invoices "has nothing to do with taxes. It had to do with the people who want to preserve their anonymity." N.T., Vol. II, pp. 92-93. On the other hand, Bellante and Mendelson, the general manager of Trap Rock, testified that the defendant informed them that the invoices

would be furnished them for tax purposes, with no mention of anonymity. On the basis of the testimony of Bellante and Mendelson, the jury could have properly concluded that the actual purpose of the fictitious invoice scheme was to provide the taxpayers with documentation for falsifying their tax returns. And, on the basis of Smith's testimony, the jury could properly have inferred that the defendant knew that the invoice scheme was unlawful, in that, if he had thought otherwise, he would not have assured Smith that the scheme was for anonymity and not for tax purposes.

4. *Improper Influences on the Grand Jury*

Defendant argues that the indictment in this case should be dismissed because it was tainted by two kinds of improper influence on the grand jury's deliberations: (a) prejudicial publicity concerning the defendant that appeared in several newspapers immediately prior to and during the grand jury's deliberations, and (b) the calling of the defendant to testify before the grand jury even though he was a prospective defendant at the time and the government knew that he intended to invoke his privilege against self-incrimination, as well as the manner in which the defendant was repeatedly required to assert his fifth amendment privilege during his testimony before the grand jury. Both contentions are without merit.

With respect to the first contention, the defendant points to no actual bias or undue influence on the

grand jury, but argues instead that the mere existence of the extensive pre-indictment publicity in this case mandates a *per se* conclusion that the grand jury was biased and that the indictment must be dismissed. The identical argument was made before Judge Whipple in the District of New Jersey in support of a motion to dismiss the indictment filed prior to the first trial in this case. It was rejected on that occasion and must be rejected on this occasion as well. In the words of Judge Whipple:

> "In the instant case, without a shred of evidence to the contrary, 'it must be presumed that the Grand Jury followed the court's instructions as to its powers, duties and obligations and that each grand juror fully lived up to and observed his solemn oath. Indeed there is a strong presumption of regularity accorded to the deliberations and findings of Grand Juries.' *United States* v. *Kahaner*, 204 F. Supp. 921 (S.D.N.Y. 1962), *affirmed*, 317 F. 2d 459 (2d Cir. 1963). Therefore, since the instant defendant has not presented any evidence, nor have I found any, that the Grand Jury was prejudiced against Mr. McCrane, this Court declines to rule in the defendant's favor on the basis of this allegation."

United States v. Joseph M. McCrane, Jr., Crim. No. 341-73, D.N.J. 1973, opinion filed April 23, 1974, p.3. *See* also United States v. Addonizio, 313 F.Supp. 486, 495 (D.N.J. 1970), *aff'd*, 451 F.2d 49 (3d Cir. 1971, *cert. denied*, 405 U.S. 936 (1972) ("Nothing of substance is provided to support defendants' allegations. Mere conjecture that some impropriety may have occurred and some infirmity in the proceedings

resulted thereby is an insufficient premise for the relief sought.")

The second contention is equally meritless. It is clear that it is not improper to call a prospective defendant to testify before the grand jury which ultimately indicts him, even when such a defendant makes it known to the prosecuting authority that he intends to invoke the Fifth Amendment. United States v. Addonizio, *supra*, at 495; United States v. Wolfson, 405 F.2d 779, 784-785 (2d Cir. 1968), *cert. denied*, 394 U.S. 946 (1969). Such a practice is consistent with the government's responsibility to fully investigate suspected criminal activity and to thoroughly test a witness's invocation of the Fifth Amendment to insure that the privilege is being properly claimed. United States v. Sweig, 441 F.2d 114, 121 (2d Cir. 1971), *cert. denied*, 403 U.S. 932 (1971); United States v. Wolfson, *supra* at 785. Furthermore, a reading of the transcript of the grand jury proceeding reveals no impropriety in the manner in which the defendant was question. The government's attorney did nothing more than properly test the validity of the defendant's reliance on his right to remain silent. *See* United States v. Wolfson, *supra*, at 785.[8]

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[8] Indeed, it would appear that the defendant's invocation of the Fifth Amendment before the grand jury was not entirely valid, inasmuch as, following a hearing before Judge Lacey out of the presence of the grand jury, the judge ordered the defendant to answer three of the questions which he had previously refused to answer on Fifth Amendment grounds.

NEW TRIAL

The numerous grounds asserted by the defendant in support of his motion for a new trial may be grouped in four general categories: (1) the failure of the government to produce exculpatory evidence; (2) the lack of authorization of the Assistant United States Attorney who prosecuted the case to represent the government in this district; (3) the manner in which the government utilized the fact that several government witnesses had been granted immunity; and (4) this court's instructions to the jury. They will be discussed in the order listed.

1. *Exculpatory Evidence*

The defendant maintains that two failures of the government to produce exculpatory evidence during his trial mandate the granting of a new trial: (a) the failure to produce seven letters written by the office of the United States Attorney on behalf of E. Lawrence Bellante, a key government witness in this case, and (b) the failure to timely produce other allegedly exculpatory evidence (such evidence was produced during the trial, but only after the defendant specifically requested that it be produced). In neither instance does the government's conduct require the granting of a new trial.

a. *The Bellante Letters*

These letters were the subject of an earlier opinion by this Court, on March 6, 1975, in which it was

ordered that all communications written by the government at the behest or on behalf of any witnesses who testified at defendant's trial be turned over to the defendant in order that the question of whether their non-disclosure necessitates a new trial may be fully and freely discussed.[9] That order resulted in the production of eight letters written on behalf of Bellante, seven prior to the trial and one after the trial, and the defendant now argues that the non-disclosure of the initial seven letters mandates a new trial under the standards of Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972).

The letters in question were written between 18 and 11 months prior to the commencement of defendant's trial before this Court (six during the summer and fall of 1973 and one in January of 1974), and were sent in response to requests made of the United States Attorney's office either by Bellante's counsel or by the addressee (four were solicited by Bellante's attorney and three by the party to whom the letter was sent). They are all substantially identical, and are in essence letters written to various public authorities and offices in the state of New Jer-

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[9] Defendant first learned of the existence of the letters on December 15, 1974, which was four days after the completion of his trial, when two New Jersey newspapers reported that Bellante had received an architectural contract for a new sports stadium to be built in New Jersey, and that the United States Attorney for the District of New Jersey had written letters on behalf of Bellante in order to help him secure the contract.

sey [10] explaining the relationship between the United States Attorney's office and Bellante and his architectural and engineering firm, Bellante, Clauss, Miller and Nolan, Inc., which at the time was under consideration for architectural contracts in connection with various public projects in the state of New Jersey.[11] In each instance the letter advised that Bel-

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[10] The dates and addresses of the letters are as follows: June 18, 1973 to Commissioner John C. Kohl of the New Jersey Department of Transportation; June 21, 1973 to John L. Swink, Senior Vice President and Treasurer of Rutgers University; July 5, 1973 to the New Jersey Sports and Exposition Authority; July 5, 1973 to Milton H. Gelzer, Esquire; July 13, 1973 to Donald S. Howard, President of the Board of Education of the Borough of Rumson; October 16, 1973 to William W. Watkin, Jr., Executive Director, Delaware River Port Authority; and January 8, 1974 to Richard C. Walters, Assistant Counsel, Department of the Navy.

[11] The letter of June 18, 1973 is illustrative:

"June 18, 1973

Commissioner John C. Kohl
Department of Transportation
1035 Parkway Avenue
Trenton, New Jersey 08625

Re: United States v. Bellante, Clauss, Miller & Nolan, Inc., Cr. No. 345-73

Dear Commissioner:

I am in receipt of a letter dated June 13, 1973 from the attorneys who represent Bellante, Clauss, Miller & Nolan, Inc. They have advised me that your office will be conducting a hearing on June 21, 1973 relative to the standing of this corporation to bid on public contracts in the State of New Jersey.

This is to advise that one of the principals of this firm, E. Lawrence Bellante, has been immunized by the United

States District Court and has furnished valuable testimony to the United States Grand Jury that is currently investigating a scheme to defraud the United States in which contributors to the 1969 Cahill gubernatorial campaign were furnished false and fictitious invoices for non-existent services in order that these contributors could deduct their political contributions as ordinary and necessary business expenses. Mr. Bellante has cooperated fully with the United States Grand Jury and has testified as to his participation in this scheme. Indictments have been returned against Joseph M. McCrane, Nelson G. Gross, as well as Bellante, Clauss, Miller & Nolan, Inc., all emanating from Mr. Bellante's testimony.

This office brings these facts to your attention for your consideration as to whether Bellante, Clauss, Miller & Nolan, Inc., should be barred from further bidding on state work. On previous occasions we have expressed our concern that individuals that cooperate with the United States Grand Jury pursuant to a grant of immunity should not be penalized for telling the truth. It is in this context that I bring Mr. Bellante's cooperation to your attention for your consideration in reaching a final determination of the matter before you. In the final analysis, this determination must be made by your office and we do not in any way intend to interfere with your discretion in this matter.

If there are any further questions that you may have, please do not hesitate to call me.

Very truly yours,

HERBERT J. STERN
UNITED STATES ATTORNEY

By: JONATHAN GOLDSTEIN
First Assistant
United States Attorney

cc: Leo McCormack, Esq.
c/o Nogi, O'Malley & Harris
Miller Building
Scranton, Penna. 18503"

lante has received immunity and has cooperated fully with the grand jury investigating the tax fraud scheme underlying this case by furnishing valuable testimony to that body; that as a result of this testimony indictments have been returned against Joseph McCrane and the firm of Bellante, Clauss; that Bellante should not be penalized because of these facts; and that the United States Attorney's Office takes no position with respect to what action the addressee should take as a result of being informed of these facts.

The defendant now argues that the non-disclosure of these letters mandates a new trial because, if he had possessed them during the trial, he could have used them to impeach the credibility of Bellante by showing that the letters were beneficial to the witness and that the witness was under the impression that the continued help of the government was dependent upon his testimony at defendant's trial. Such non-disclosure of impeachment evidence, defendant contends, requires a new trial under the standard elaborated in Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972). His argument misperceives the requirements of the *Brady-Giglio* rule, and mischaracterizes the significance of the letters at issue here.

In effect, defendant argues that *Brady* and *Giglio* require a new trial whenever a search of the government's files at the conclusion of a trial turns up evidence that may have been used by the defense to

impeach the credibility of one of the government's witnesses. Those cases impose no such rigid rule. *Brady* held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, *supra*, at 87. *Brady* involved a petitioner whose defense had been to admit guilt of first degree murder while asking the jury to return a guilty verdict without capital punishment because his co-defendant had done the actual killing. He was convicted and sentenced to death. After the trial, the defendant learned that the government had withheld a statement from his co-defendant admitting that he had committed the actual killing, even though prior to trial the defendant had requested production of all of his companion's extra-judicial statements. The Court held that such a suppression violated the principle of Mooney v. Holohan, 294 U.S. 103 (1935) (knowing use of perjured testimony to obtain a conviction held to violate due process), in that it denied the defendant a fair trial on the issue of his punishment. Brady v. Maryland, *supra*, at 87-88. The Brady rule was elaborated more fully by the Court in Moore v. Illinois, 408 U.S. 786 (1972), at 794-795:

> "The heart of the holding in *Brady* is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material

> either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence."

In Giglio v. United States, 405 U.S. 150 (1972), the Court made clear that the *Brady* rule extends to suppressed evidence relating to the credibility of a government witness. In Giglio, the prosecution did not disclose that the key witness at defendant's trial (the only one linking him to the crime) had been promised immunity from prosecution in return for his cooperation with the government, even though the witness denied the existence of any agreements or arrangements for prosecutorial leniency in the face of vigorous cross examination by defense counsel at trial. The Court held that due process had been violated and ordered a new trial. The opinion emphasized, however, that not every item of undisclosed evidence arguably affecting the credibility of a government witness will require a new trial. The Court stated at 405 U.S. 154:

> "We do not, however, automatically require a new trial whenever a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict . . . *United States* v. *Keogh*, 391 F. 2d 138, 148 (CA2 1968). A finding of materiality of the evidence is required under *Brady*, *supra*, at 87. A new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment

> of the *jury* . . . *Napue*, *supra*, at 271 [referring to Napue v. Illinois, 360 U.S. 264 (1959)].' "

The test, then, is whether the non-disclosed evidence could in any reasonable likelihood have affected the judgment of the jury.[12]

When judged according to the standards of the *Brady* and *Giglio* cases, it is clear that the government's non-disclosure of the letters at issue here did not interfere with the defendant's due process right to a fair trial. Assuming that that non-disclosure amounted to "suppression by the prosecution after a request by the defense," Moore v. Illinois, 408 U.S. 786, 794 (1972),[13] the letters are not "favorable" to

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[12] The Court's language has caused some confusion among the Courts of Appeals concerning which jury judgment is crucial here, the judgment of conviction itself, or the jury's assessment of the witness's credibility. The Third Circuit seems to have assumed that the test is whether the suppressed evidence could in reasonable likelihood have changed the jury's verdict. United States ex rel. Dale v. Williams, 459 F.2d 763, 767 (3d Cir. 1972). See also United States v. Miller, 499 F.2d 736, 744 (10th Cir. 1974) ("The salient inquiry is whether production of the requested information might have led the jury to entertain a reasonable doubt about the defendant's guilt.") The Ninth Circuit, on the other hand, states that the test is whether knowledge of the undisclosed evidence with respect to the credibility of a witness "might reasonably have affected the jury's assessment of his credibility." United States v. Butler, —— F.2d —— (9th Cir. 1974), 16 Crim. L. Rept. 2345, 2346 (opinion filed 12-18-74). It is not necessary to decide here which view is correct, however, in that I hold the Bellante letters do not require a new trial under either standard.

[13] On several occasions prior to the commencement of his trial, the defendant made formal requests of the government for all exculpatory evidence.

the defendant within the meaning of *Brady*. They are simply factual recitations of the status of Bellante and the firm of Bellante, Clauss in the United States District Court for the District of New Jersey. They contain no evidence of any understanding between Bellante and the United States Attorney's office or any belief on the part of Bellante that he would receive any favors or privileges in return for his cooperation with the government. Cf. United States v. Sperling, 506 F.2d 1323, 1332-1334 (2d Cir. 1974) (non-disclosure of letter from an informant-witness to an Assistant United States Attorney thanking the attorney for privileges he had arranged, asking for further favors, and discussing the status of his own pending case held to require new trial).[14] Nor do they contain any other information that would have provided the defendant with a reasonable likelihood of affecting the jury's assessment of Bellante's credibility. Cf. United States v. Badalaments, 507 F.2d 12, 16-18 (2d Cir. 1974) (non-disclosure of letter from key witness to judge indicating that the witness was being harassed and terrorized to become a government informant and "trap a number of prominent people" held to require a new trial).[15] In light of the nature of the letters themselves, as well as the government's repeated assertions that there was no understanding or agreement between it and Bellante with respect to his testimony, other than Bellante's grant of immunity which was fully disclosed to the jury during the trial, the defendant's assertion that Bellante's testimony was given in reliance on preferential treatment by the government is simply non-tenable. Cf. United States v. Newman, 476 F.2d 733, 738 (3d Cir. 1973). Accordingly, I hold that this evidence could not have affected the judgment of the jury.

[14] Although *Sperling* involved a failure of the government to produce Jencks Act material, and thus the Court was not addressing the question of whether a new trial was required under the mandate of *Brady* and *Giglio*, it is nevertheless relevant here because of the similarity of the test applied in that case to the corresponding test in a *Brady-Giglio* inquiry. The Court in *Sperling* stated, 506 F.2d at 1333: "Since the government failed to provide significant Jencks Act materials, the test is whether 'there was a significant chance that this added item, developed by skilled counsel . . . , could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction.'" (citations omitted). The *Brady-Giglio* test is whether the non-disclosed evidence "'could . . . in any reasonable likelihood have affected the judgment of the jury . . .'" Giglio v. United States, 405 U.S. 150, 154 (1972) (citation omitted).

b. *Untimely Production of Evidence*

The defendant contends that the following four instances of governmental delay in producing evidence, allegedly required under *Brady* and *Giglio* to be disclosed to the defendant, mandate a new trial: (1) documents relating to payments by Trap Rock of invoices, allegedly representing political advertising, from advertising firms other than Writers Associates occurring both prior and subsequent to Trap

[15] *Badalaments* is also a Jencks Act case. See footnote 14, *supra*.

Rock's transactions with Writers Associates referred to in Count IV; (2) a letter from Paul J. Sherwin to Arthur S. Kaplan of the advertising firm of Bofinger-Kaplan, Inc. on Cahill for Governor stationary relating to a bill to E. Lawrence Bellante; (3) a list of contributors to the Cahill campaign from whom Writers Associates received money; and (4) deposit slips of Writers Associates relating to these campaign contributions. It is defendant's position that these documents are all *Brady-Giglio* material because they impeach the credibility of government witnesses, and that the government's untimely presentation of the documents to the defense denied the defendant the opportunity to use them in the most effective manner possible, thereby preventing him from actually impeaching the credibility of the witnesses in question.

While it is apparently true that under some circumstances the untimely production of *Brady* material can result in a denial of due process,[16] it is

[16] *See, e.g.* Clay v. Black, 479 F.2d 319 (6th Cir. 1973), where the defendant had been convicted of murder primarily on the basis of an eyewitness's testimony that the defendant had taken the decedent out of a car, placed him against the vehicle and shot him. The defendant's version was that he and the decedant had been struggling inside the car when the gun went off. During the trial defense counsel learned of an FBI report, received by the government approximately five months prior to the trial, that indicated that blood stains removed from the upholstery of the front seat of the car were of the same type and group as the decedent's. When he sought to introduce the report the trial court refused to admit it because there was no showing of chain of custody of the car

clear for two reasons that this is not such a case: the documents in question are not *Brady-Giglio* material and the defendant was not prejudiced by the timing of his receipt of them.

With respect to the Trap Rock documents, it is necessary to relate some background facts in order to understand the defendant's argument. The defense strategy with respect to the count involving Trap Rock was to dispute that the defendant had arranged a scheme for Trap Rock to deduct its contributions made through Writers Associates by showing that Trap Rock had on several occasions prior and subsequent to the Writers Associates dealings made political contributions through other advertising firms which were later deducted on its tax returns. Simply stated, the defense argument was that Trap Rock did not need the defendant to demonstrate how to expense political contributions because it was experienced in that practice and, therefore, the testimony of Trap Rock's general manager in 1969, David Mendelson, that the defendant had solicited a contribution from Trap Rock by advising him that the firm could expense its contribution by using a fictitious Writers Associates invoice which the defendant would furnish, was false. The credi-

for the intervening fourteen hours between the shooting and the taking of the blood sample. The Court of Appeals held that the failure of the government to produce the report prior to trial was a denial of due process, inasmuch as if defense counsel had had the report at that time he would have had time to make it admissible by establishing the chain of possession of the car. *Id.*, at 320.

bility of Mendelson, then, was crucial to the government's case.

During cross examination, Mendelson stated that he was not aware of political contributions made by Trap Rock through advertising firms other than those that were made through Writers Associates about which he had testified on direct examination. Defense counsel then showed the witness three invoices to Trap Rock from other advertising firms, all marked paid, two of them initialed by the witness, and one of those two bearing the notation above the witness's initials "Nelson Gross Campaign." (Defense exhibits 19-21) In spite of defense counsel's vigorous questioning, Mendelson denied knowing what work the invoices represented and did not concede that they represented political contributions. He stated that he had initialed the documents under instructions from Trap Rock's president without being aware of what the payments represented.

Interspersed with this examination were several sidebar conferences at which defense counsel claimed that the government had in its possession additional invoices and related documents from other advertising firms to Trap Rock which represented political contributions, and demanded that the government produce them as *Brady* material.[17] Several addi-

[17] Technically speaking, the government did not produce the documents. Although they were in the government's possession, and would have been produced by government counsel, defense counsel objected that the documents alone, without any accurate explanation of what the payments actually represented, would not help him. In the interest of expediting an

tional documents were thus produced the following Monday, and were admitted into evidence as defense exhibits 24-27, 30-31, and 33-37. Some of these documents showed expenditures by three advertising firms for political campaigns during 1969, and others were invoices by the same firms to Trap Rock during that period. Defense counsel resumed his cross examination of Mendelson, but terminated it after a short while. The only additional documents about which the witness was asked were another invoice and related documents from the O'Mealia Outdoor Advertising Corporation that had been initialed by Mendelson, and had been admitted into evidence as defense exhibit 24. The witness maintained his position of the previous Friday that he was aware of no political contributions made by Trap Rock through advertising firms other than those that were made through Writers Associates. Defendant now argues that the late production of defense exhibits 24-27, 30-31, and 33-37 so impaired his cross examination of Mendelson as to amount to a denial of due process.

The defendant is mistaken that the documents in question are *Brady-Giglio material.* They do not reflect any conflict with Mendelson's testimony on direct examination with respect to his dealings with

already lengthy trial, the Court accommodated defense counsel by issuing subpoenas to the advertising firms in question, directing them to produce the documents in question the following Monday morning and to have someone present in court who could explain what the payments represented. Nevertheless, for the sake of this discussion, I will assume that the government produced the documents in question.

the defendant. Furthermore, although the documents do suggest that Trap Rock made political contributions through advertising firms other than Writers Associates, they do not conflict with Mendelson's statement on cross-examination that he was unaware of any such other contributions. *Cf.* United States v. Polisi, 416 F.2d 573 (2d Cir. 1969) (non-disclosure of FBI report containing statement of one government witness, who did not testify at defendant's trial, that was in clear conflict with trial testimony of another government witness with respect to the defendant's role in a series of robberies, held to violate *Brady*). Accordingly, the government was not obligated to turn the documents over to the defense.

Moreover, the defendant was not prejudiced by the timing of his receipt of the documents in question. Those documents were cumulative and corroborative of other documents which defense counsel had in his possession prior to trial and which he used as the basis of a thorough cross-examination on Friday afternoon. In addition, he had ample opportunity to cross-examine Mendelson on Monday with respect to all of the documents which he had received that morning, but chose not to do so. In short, defendant's opportunity to challenge Mendelson's credibility was not in the least impaired by the timing of his receipt of any documents in this case.

Defendant's timeliness argument with respect to the other documents can be disposed of summarily. His contention with respect to the letter to Arthur S. Kaplan is that it should have been produced be-

cause it corroborated the defense theory that there was no unlawful intent on the part of the defendant throughout all of the activity that formed the basis of this case, as evidenced by the fact that there was no attempt to conceal the solicitation of political contributions through fictitious invoices from advertising firms. His argument with respect to the Writers Associates documents is similar; the fact that a list of contributors was maintained by that firm and that the names of contributors were listed on deposit slips would have corroborated the contention that the entire operation was open and not fraudulent. The short answers to these arguments are that the Kaplan letter and the list of contributors were produced and presented to the jury, and that there is no evidence to rebut the government's denial that it possessed the deposit slips. In addition, to the extent that the defendant argues that he should have possessed the Kaplan letter at the time he initially cross-examined Kaplan and Bellante, and that he should have had the list of contributors at the time he cross-examined Smith, those documents do not conflict with the testimony of any of those witnesses and thus could not have been used to impeach their testimony. Indeed, the list of contributors merely corroborated the testimony of Smith. Moreover, defense counsel recalled Bellante and questioned him concerning the Kaplan letter. Finally, and most important, the documents are not *Brady-Giglio* material and were not required under those cases to be turned over to the defendant in the first place. Not

every shred of evidence in the government's files that may have been of possible use to a defendant because it happens to appear consistent with one of his theories falls under *Brady*, nor is the government obliged to anticipate the various defense theories that might develop in a case and comb its files for all documents that happen to be consistent with those theories.

2. *The Authority of the United States Attorney*

The defendant maintains that because the Assistant United States Attorney for the District of New Jersey who prosecuted this case, Bruce I. Goldstein, was not properly authorized to represent the government in this district the trial was a nullity and he must be retried. Specifically, he argues that the governing statute, 28 U.S.C. § 515, was not complied with in two respects: (a) the letter appointing Mr. Goldstein a Special Assistant to the United States Attorney for the Middle District of Pennsylvania was not specific enough, and (b) Mr. Goldstein failed to take the oath required by law prior to the commencement of the defendant's trial before this Court.

With respect to the argument concerning the letter of authorization, the short answer is that the defendant failed to raise any question with respect to the authorization of the government's attorney until the filing of the instant motion, which was long after the completion of the eight-day trial in this case. He is thus deemed to have waived any objection to the

authority of the attorney who actually prosecuted the case for the government. *See* Home News Publishing Company v. United States, 329 F.2d 191, 193 (5th Cir. 1964). In any event, the letter in question does contain the degree of specificity required by the statute and the cases cited by the defendant. The letter is dated November 29, 1974, and provides that Mr. Goldstein has "been appointed for a period not to exceed three weeks. This appointment expires January 1, 1975." Bearing in mind that the letter was written shortly after the venue of defendant's case was transferred from the District of New Jersey to this district and shortly before the defendant's trial was to commence before this Court, it can be fairly inferred that Mr. Goldstein's authority in this district was limited to the prosecution of the defendant's case.[18] The fact that the letter of authorization did not specifically mention the defendant's case is not in the least persuasive to the contrary. Finally, the cases cited by the defendant in which appointments under 28 U.S.C. § 515 were found to be insufficiently specific involved the participation of unauthorized persons in grand jury proceedings. They simply are not apposite to this case, a trial in which there was a transfer of venue upon the defendant's motion, and the same attorneys who represented the parties in the original forum continued to represent them in this one.

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[18] In point of fact Mr. Goldstein's actions in this district were so limited, and were completed on December 11, 1974.

With respect to Mr. Goldstein's taking of the oath, the fact is that he took the oath called for by 28 U.S.C. § 515 on December 11, 1974, shortly after the jury returned its verdict. The defendant argues, without citation of any pertinent authority, that this was too late to confer validity on the proceedings, and that, accordingly, they are null and void. I simply am not persuaded by defendant's technical argument concerning a requirement that seems at best a formality, and therefore reject it.

3. *The Immunity of Government Witnesses*

The defendant next argues that the manner in which the government employed the fact that four of its witnesses testified under prior grants of immunity so prejudiced him as to require a new trial. Specifically, he maintains that the manner in which these witnesses were questioned on direct examination concerning their immunity, as well as the government attorney's discussion of immunity in his opening and closing arguments to the jury, constituted prejudicial error in three respects: (a) it implied defendant's guilt by association with these witnesses; (b) it improperly implied a prior trial of defendant; and (c) it improperly bolstered the credibility of the government witnesses. These contentions are without merit.

At the outset, it is noted that the defendant failed to object during the trial to either the government attorney's discussion of immunity in his opening and closing arguments, or to the manner in which

he examined the witnesses concerning their immunity. Hence, these actions must constitute "plain error" in order for a new trial to be ordered on their account. Rule 52(b), Fed. R. Crim. P. The "plain error rule . . . is appropriate . . . in exceptional cases to preserve grave miscarriages of justice or to preserve the integrity of judicial proceedings." United States v. Carter, 401 F.2d 748, 759 (3d Cir. 1968). It is clear that the plain error rule is inappropriate here.

Moreover, the government attorney's handling of the immunity issue in this case was entirely proper. To begin with, it is undisputed that it is appropriate for the government to elicit on direct examination a witness's prior grant of immunity. United States v. Silverman, 430 F.2d 106, 124-125 (2d Cir. 1970). Indeed, failure to disclose that a witness is immune from prosecution may under certain circumstances amount to a denial of due process. Giglio v. United States, 405 U.S. 150 (1972). More important, the actual handling of the issue was not improper. In his opening argument to the jury, the government attorney explained to the jurors that a witness testifying under a grant of immunity is required to testify and may not claim his Fifth Amendment privilege which he might otherwise have a right to invoke; that the immunity statute provides that such a witness may be prosecuted for perjury if he testifies improperly; and that some of the government witnesses in this case would be testifying under grants of immunity. A fair reading of his statements re-

veals that their primary purpose was to caution the jury not to be prejudiced against the government's case because some of its witnesses had been immunized. (N.T., Vol. II, pp. 166-168). In his closing argument, the government attorney asked the jurors to consider the fact that certain witnesses had received immunity in evaluating their credibility. This was entirely proper, as a jury may consider the fact that a witness has been immunized in evaluating his credibility. United States v. Silverman, 430 F.2d 106, 124 (2d Cir. 1970). Finally, in his questioning of each of the immunized witnesses, the government attorney reminded the witness that he had received immunity in a prior proceeding earlier in the year; that the presiding judge in that prior proceeding had advised him that if he did not testify truthfully he could be prosecuted for perjury; and that those same principles applied in the instant trial.[19] There was nothing improper in any of this,

[19] The questioning of Mendelson is illustrative:

"Q Mr. Mendelson, you have testified in prior proceedings before the United States District Court, have you not?

"A Yes, I have.

"Q Prior to your testimony you were, sir, compelled to testify by Judge Whipple pursuant to a grant of immunity; were you not, sir?

"A Yes, sir.

"Q On that occasion did he advise you that you had to testify pursuant to that grant of immunity but that you had to testify truthfully?

[Footnote continued on page 65a]

and the arguments and cases advanced by the defendant are not persuasive to the contrary. The cases cited in support of the contention that the government used the immunity of its witnesses to create guilt by associaion all involve prosecutors who placed an unimmunized witness on the stand, knowing that he would validly invoke the privilege against self-incrimination. *See, e.g.*, United States v. Tucker, 267 F.2d 212, 215 (3d Cir. 1954). They do not apply here. The argument that "the mention of prior proceedings both in the questioning of the witness as to immunity and at other times allowed an improper and untrue inference of a prior guilty verdict in the instant case. . ." (Defendant's Brief, at 131) is untenable. Indeed, the government attorney informed the Court at oral argument on the instant

[19] [Continued]

"A Yes.

"Q Do you recall that?

"A Yes.

"Q Do you recall that he further advised you, Mr. Mendelson, that if you did not testify truthfully you could be prosecuted for perjury?

"A Yes.

"Q Do you recall that?

"A Yes.

"Q Do you understand the principles Judge Whipple laid down on that occasion apply today before Judge Nealon?

"A Yes, I do."

N.T. Vol. V, pp. 5-6.

motions that he intentionally used the term "prior proceedings" in order to avoid an intimation that there had been a previous trial in this case. Finally, the contention that the government used immunity to improperly bolster the credibility of its witnesses is without merit. It overlooks the facts that the immunization of a witness can work both ways with respect to his credibility and, once again, that it is proper for a jury to consider such immunity in evaluating the credibility of a witness. United States v. Silverman, 430 F.2d 106, 124 (2d Cir. 1970).

4. *The Instructions to the Jury*

The defendant argues that certain errors in the Court's instructions to the jury mandate a new trial. Specifically, defendant maintains (a) that the Court should have specifically and explicitly instructed the jury not to consider the evidence with respect to the seven counts in the indictment as to which a judgment of acquittal was directed at the close of the government's case; and (b) that the Court's failure to instruct in accordance with four of the defendant's requests for instruction constituted error.

The defendant's argument with respect to the dismissed counts is that a specific instruction to the jury that they should disregard the evidence pertaining to those counts was necessary to prevent the jury from considering that evidence, and that, in the absence of such an instruction, juror confusion and prejudice was inevitable because of the large

volume of evidence in this case. The immediate reaction to this contention is that the defendant failed to request such a specific instruction of the Court, and did not object to the portion of the charge that dealt with the evidence that the jury could properly consider during its deliberations. Hence, he is precluded from assigning that portion of the charge as error. Rule 30, Fed. R. Crim. P.

In point of fact, moreover, the defendant was not actually prejudiced by the evidence pertaining to the dismissed counts. Defendant offers no evidence of actual confusion or prejudice on the part of the jury, nor does he point to any particular item of evidence as being confusing or prejudicial. In addition, it is not reasonable to conclude that the jury was confused or prejudiced during its deliberations by the evidence concerning the dismissed counts. As the result of a stipulation by counsel regarding what evidence would accompany the jury during its deliberations, no documents with respect to the dismissed counts accompanied the jury when it retired to deliberate. And the Court's instructions were more than adequate to obviate any confusion or prejudice as a result of the numerous counts and voluminous evidence in this case. The Court stated in pertinent part:

> "In deciding this case, members of the jury, you are to consider each count individually. The fact that the Government has proved its case beyond a reasonable doubt or has failed to prove its case beyond a reasonable doubt as to any single count

> does not in and of itself require a finding of either guilty or innocent as to any other count. It is your obligation and duty to consider each count individually and arrive at a separate finding of guilty or innocent as to each of the four counts in the indictment. And as to each count you are to determine guilt or innocence only on the evidence that applied to that particular count."

N.T., Vol. VIII, p. 18.

The arguments with respect to the failure to instruct in accordance with the defendant's requests can be dealt with summarily. The first is that the Court should have instructed the jury that, in order to find the defendant guilty, they had to find that he caused deductions to be overstated in a substantial amount. The law with respect to 26 U.S.C. § 7206 (2) does not support such a requirement. The amount of tax benefit to the taxpayer in a Section 7206(2) case is irrelevant. Edward v. United States, 375 F.2d 862, 865 (9th Cir. 1967). It is the defendant's participation in the falsity of a return, and not the tax liability of the taxpayer, that is crucial in a Section 7206(2) case.

The defendant next argues that the Court should have instructed that under some circumstances political contributions are deductible as ordinary and necessary business expenses. He maintains that the failure to so instruct withdrew from the jury the defense theory of a lack of willfulness on defendant's part because of his belief that political contributions were deductible. The quick answer to this argument is that

the Court instructed the jury that "the Government must prove beyond a reasonable doubt that [the defendant] knew and believed political contributions were not deductible." N.T., Vol. VIII, pp. 35-36. Thus, the defendant's theory with respect to willfulness was submitted to the jury. Furthermore, the instruction requested by the defendant was not relevant to this case. The defendant was not charged with or convicted of assisting others to deduct political contributions listed as such on their tax returns, but with having caused political contributions to be misrepresented on tax returns as ordinary and necessary business expenses for advertising and public relations services. *Cf.* Stern v. United States, 436 F.2d 1327 (5th Cir. 1971), where the taxpayer forthrightly stated in her gift tax return that she had made political contributions which she did not consider taxable under the gift tax statutes. *Id.*, at 1328-1329. The defendant's request in this regard was properly rejected.

Finally, the defendant maintains that the jury should have been instructed that they could find him guilty only if they found that he had participated in the actual preparation and filing of the tax returns, and that the Court improperly instructed the jury with respect to willfulness. Both contentions are meritless. As discussed previously, participation in the actual preparation and filing of a tax return is not an essential element of a Section 7206(2) violation. The jury was properly instructed that:

> "You need not find that the defendant took any part in the actual preparation or presentation

> of the tax return. The United States need only prove that the defendant knew or believed that when the return was filed it would be false or fraudulent in that it would contain a political contribution which would be wrongfully deducted."

N.T., Vol. VIII, p. 35. In addition, the jury was properly instructed with respect to the element of willfulness. The Court charged:

> "In order to find that an act was done willfully by this defendant, you must find beyond a reasonable doubt that it was done voluntarily and intentionally and with a specific intent to do something the law forbids. That is to say, with bad purpose either to disobey or disregard the law."

N.T., Vol. VIII, p. 33. *See* United States v. Malinowski, 472 F.2d 850, 853 (3d Cir. 1973); United States v. Klee, 494 F.2d 394, 395 (9th Cir. 1974), cert. denied, ——— U.S. —— (1975).

The defendant's final arguments have already been disposed of. One is that this Court should have ordered discovery as to the knowledge of the United States Attorney's Office of the District of New Jersey as to the imminence of public statements made by the Attorney General of the State of New Jersey during defendant's first trial in the District of New Jersey. This contention was rejected by this Court in an opinion and order filed March 6, 1975, and is again rejected for the reasons in that opinion. The final argument relates to the collateral estoppel argument in support of the motion for acquittal. It is that it was

improper for the defendant to be convicted of aiding and assisting in the preparation of false or fraudulent income tax returns when he was charged with such aiding and assistance in furtherance of a conspiracy, and that the deletion of the phrase "pursuant to the plan and purpose to commit the crime set forth in Count I of this indictment" from the indictment that was submitted to the jury was an improper amendment of the indictment. As discussed *supra*, the phrase in question was not an essential element of the offense with which the defendant was charged, and was properly removed from this indictment as surplusage. The offenses for which the defendant was convicted were identical to those with which he was charged in Counts III, IV, X and XI of the indictment.

In accordance with the above, the motions will be denied.

/s/ William J. Nealon
United States District Judge

Dated: May 13th, 1975

ORDER

Now, this 13th day of May, 1975, in accordance with the memorandum this date filed, defendant's motions for judgment of acquittal and a new trial are denied.

/s/ William J. Nealon
United States District Judge

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In The

Supreme Court of the United States

October Term, 1975

No. 75-1464

UNITED STATES OF AMERICA,

Petitioner,

vs.

JOSEPH M. MC CRANE, JR.,

Respondent.

BRIEF OF RESPONDENT JOSEPH M. MC CRANE, JR., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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BRIEF OF RESPONDENT JOSEPH M. MC CRANE, JR., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

This brief by respondent Joseph M. McCrane, Jr., is submitted in opposition to the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case. On March 15, 1976, Joseph M. McCrane, Jr., filed a petition for writ of certiorari at No. 75-1323.

COUNTERSTATEMENT OF THE CASE

The respondent Joseph M. McCrane, Jr., hereby adopts and reasserts, for the purposes of the Counterstatement of the Case, all that which is included within the Statement of the Case at Petition No. 75-1323 filed on March 15, 1976.

ARGUMENT

The questions before this Court are not those stated by the government, but are rather those of the petitioner Joseph M. McCrane, Jr., Petition No. 75-1323, namely: what should be the overall effect of the government's deliberate, intentional advertent suppression of *Giglio* impeachment evidence in violation of the petitioner's Fifth and Sixth Amendment rights?

The government's petition for writ of certiorari should be denied in that, the unanimous decision of the court below gave full consideration to the issues; the government's narrow and crabbed view of this Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963); and *Giglio v. United States*, 405 U.S. 150 (1972) is contrary to those decisions; the government references decisions which are clearly distinguishable and not controlling; and the government repeatedly alludes to factual matters unsupported by the record.

The government urges that the doctrine enunciated by this Court's holding in *Giglio v. United States, supra*, is not activated until such time as the government witness testifies falsely concerning a matter affecting his credibility. This distortion of the Court's holding in *Giglio* and necessarily that of *Brady* is

without foundation or precedent and has neither been adopted nor advanced by any court in dealing with this issue. The government's argument, advanced to its logical conclusion, would mean that, notwithstanding a pretrial request, the critical impeachment evidence would remain suppressed until such time as counsel discovered it during cross-examination or the witness testified falsely. The government's view that evidence affecting credibility is neither discoverable nor produceable short of perjured testimony is totally alien to the spirit, as well as the decisions of this Court in *Brady* and *Giglio*. In so urging, the government would relegate the due process-fair trial concept to a sporting event, matching the government's authority to suppress impeachment evidence against a defendant's limited ability to discover same or produce perjured testimony.

The petition is otherwise singularly subjective in its analysis of the facts. The government asserts regarding the suppressed evidence herein involved that "the matter was not part of any bargain through which the witness' testimonial cooperation was procured" (Petition No. 75-1464, pp. 2, 11, 12). There is absolutely nothing contained in this record which would remotely justify such a statement. Indeed, it is, *inter alia*, that very issue which the respondent could have explored in depth had not the evidence been deliberately withheld.

Furthermore, the government relies heavily upon the respondent's trial strategy, *vis-a-vis* the witness Bellante during the second trial, and the lack of concerted cross-examination of him on the issue of credibility. Although footnoted (Petition No. 75-1464, p. 4, fn. 2), the government fails to appreciate or fully

present to this Court that indeed Bellante's credibility was vigorously attacked during the first trial in Newark. It is naive to expect competent counsel representing respondent to make continued trips to the credibility well, only to return dry, particularly in the face of repeated denials by the government of the existence of any such impeachment evidence. Indeed, even the District Court's prodding failed to produce the critical evidence (Petition No. 75-1323, p. 8, fn. 4).

The petition continues that, "the nature of the adversary process is materially altered if, *as has happened here*, the defense is relieved of all duty to inquire into matters of this nature and if, in fact, its lack of diligence is actually rewarded with a grant of a new trial." (Petition No. 75-1464, p. 14) (emphasis added). The statement is consistent with the government's insistence on turning a blind eye to the facts of this case and is totally unsupported by the record.

Finally, the government, in a vain effort at self-justification informs this Court, after apparent communication with the United States Attorney, "that there was no conscious election of non-disclosure." *(Id.* at p. 17, fn. 11). The court below unanimously found otherwise.

The government's reliance on *United States v. Agurs*, 510 F.2d 1249 (D.C. Cir. 1975), *cert. granted*, 44 U.S.L.W. 3304 (1975) argued April 28, 1976, and *United States v. Pfingst*, 490 F.2d 262 (2d Cir. 1973), *cert. denied*, 417 U.S. 919 (1973), is misplaced. The ultimate decision by this Court in *Agurs* will not be dispositive of the questions raised by the government or by

the petitioner Joseph M. McCrane, Jr. *Agurs* involved the failure of defendant's counsel to request the crucial *Brady* evidence and his otherwise lack of diligence in discovering same. In the instant case, the record contains no such infirmity.

Pfingst is as readily distinguishable in that the court found that the undisclosed evidence was cumulative, of minimal, if any, value and the non-disclosure was inadvertent.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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s/ Thomas A. Bergstrom
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